TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~211~~ 27.

THE CITY OF MONTEREY, PLAINTIFF IN ERROR,

vs.

DAVID JACKS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1905.

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THE CITY OF MONTEREY, PLAINTIFF IN ERROR,

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In the Supreme Court of the State of California.

THE CITY OF MONTEREY, Plaintiff and Appellant,
vs.
DAVID JACKS, Defendant and Respondent.

Transcript on Appeal.

Robert S. Forbes, Attorney for Plaintiff.
Pringle & Pringle and Mastick, Van Fleet & Mastick, of counsel.

1 In the Superior Court of the County of Monterey, State of California.

Superior Court, No. 1850.

THE CITY OF MONTEREY, Plaintiff,
vs.
DAVID JACKS, JOHN DOE, RICHARD ROE, FRANK ROE, CHARLES ROE, and MICHAEL DOE, Defendants.

Complaint.

Now comes the plaintiff, the City of Monterey, by its Attorney, Robert S. Forbes, and complaining of the defendants, David Jacks, John Doe, Richard Roe, Frank Roe, Charles Roe and Michael Doe, for cause of action alleges:

2 That the plaintiff, the City of Monterey, is a Municipal Corporation of the State of California, duly incorporated and existing under the laws of said State and is the successor of the Pueblo of Monterey of Upper California.

That the plaintiff, the City of Monterey, is the owner in fee and is entitled to the possession of the following described real estate, situated in the County of Monterey, State of California, to wit:

All that certain tract or piece of land lying and being in the County of Monterey, State of California, commencing at a point on the Southern boundary line of the Rancho Laguna Seca as surveyed and patented by the United States Government where it crosses the highest ridge of the Mountains that run towards the Mission of San Carlos, where a stake is located at said intersection in mound of earth marked "M. C. No. 2" on North side and "I" on South side, one foot and six inches high and three feet wide, from which corner No. 3 of said Rancho bears North 80 degrees, West 42 chains and 12 links distant; thence running along the said highest ridge of Mountains in a Southerly and Westerly direction, following said ridge in all its sinuosities to the intersection of said ridge with the Northerly

3 boundary line of the James Meadows tract at a Live Oak tree marked "P. M. 3, M. C. 2 and 9" from which corner No. 10

of James Meadows tract of land bears South 38 degrees and 27 minutes East 104 chains and 89 links distant; thence continuing along the North boundary line of James Meadows tract Westerly and leaving summit of ridge to the South 76 chains and 33 links to a redwood stake marked "M. C. No. 2" on North side and "15" on South side in a rock mound; thence leaving the North boundary of James Meadows tract and following the highest ridge of said Mountains to the intersection of the same with the Southern boundary of the Saucito Rancho at a stake marked "M. C. 2" and "26" on South side and "S. R." on North side; thence running Easterly along the Southerly boundary line of said Saucito Rancho to the South East corner of said Rancho to post marked "S. 5," and thence running Northerly, along the Eastern boundary of said Saucito Rancho to a post marked "S. 7," being the intersection on said boundary line of the South West corner of the Rancho Laguna Seca; thence running Easterly along the Southern boundary of said Rancho Laguna Seca to the point of beginning, containing 1,635 and 3-100 acres; the said tract of land being known as lot No. 2 of the City Lands
4 of Monterey as finally surveyed and patented by the United States to the City of Monterey on November 19th, 1891.

Plaintiff alleges that the defendants claim an estate or interest in said land and premises adverse to this plaintiff and that such claim is without any right whatever; that said defendants have not any estate, right, title or interest whatever in or to the above described land and premises or any part thereof; and the plaintiff desires to have the same determined.

Plaintiff alleges that the defendants are in the possession of said land and premises.

That the true and real names of the defendants, John Doe, Richard Roe, Frank Roe, Charles Roe and Michael Doe are not known to the plaintiff and plaintiff designates them by fictitious names and prays that when their true and real names are ascertained the same may be inserted herein, and in all further proceedings in this action in lieu of said fictitious names with proper and apt words to charge them respectively.

That the value of the rents and profits of the said land and premises is $250 per month.

Wherefore plaintiff prays that the defendants and each of
5 them be required to set forth the nature of his claim; that all adverse claims of the defendants and each of them in and to said lands and premises may be determined by the decree of this Court; that by said decree it be declared and adjudged that the defendants have not and that neither of them has any estate or interest whatever in or to said land and premises; that the plaintiff is the owner thereof, and that the title of plaintiff thereto is valid. That plaintiff have and recover the possession of said land and premises and have writ of possession therefor. That the plaintiff have judgment for the sum of $250 per month for the value of the rents and profits for the withholding of the possession of the said lands and premises from the commencement of this action until the entry of judgment

herein, together with costs of suit and such other and further relief as may be just.

ROBERT S. FORBES,
Attorney for Plaintiff.

EDWARD J. PRINDLE,
W. C. BELCHER,
Of Counsel.

[Endorsed:] "Filed December 19th, 1891, T. J. Riordan, Clerk."

6 [Title of Court and Cause.]

Answer of Defendant Jacks.

(Superior Court, No. 1850.)

Now comes the defendant, David Jacks, answering the complaint filed herein against him and for such answer denies and avers as follows:

I.

He denies each and every allegation in the said complaint contained.

II.

He avers that the plaintiff is that city of Monterey which was the successor of the pueblo of Monterey of Upper California, and all acts to incorporate said city of Monterey and all acts amendatory thereof were repealed by an Act of the Legislature of the State of California entitled "An Act to repeal an act entitled 'An Act to incorporate the city of Monterey, approved May 11, 1853, and acts amendatory thereof approved March 4, 1857, April 16, 1862 and April 2, 1866,' approved March 16, 1899." That no other acts or statutes exist incorporating the city of Monterey or any city of Monterey
7 save and except the repealed statutes hereinbefore set forth; and that the plaintiff has no capacity to sue nor to maintain this action, for that the plaintiff is not incorporated under any of said statutes, nor otherwise, nor in any manner, nor by any means whatsoever.

III.

The defendant further avers that the plaintiff's cause of action is barred by the provisions of Section 316 of the Code of Civil Procedure of said State, and that plaintiff's cause of action is further barred by the provisions of Section 319 of the Code of Civil Procedure of said State.

Wherefore this defendant prays to be dismissed hence, with his costs of suit herein expended.

W. M. R. PARKER AND
A. C. FREEMAN,
Attorneys for Defendant Jacks.

[Endorsed:] "Filed Nov. 22, 1893, T. J. Riordan, Clerk, by J. D. Kalar, Deputy Clerk"

[Title of Court and Cause.]

Amendment to Answer of Defendant Jacks.

(Superior Court, No. 1850.)

8 The defendant, David Jacks, by leave of the Court first had and obtained, files this, his amendment to the answer filed herein by him, to-wit:

After the third paragraph of said answer and before the prayer in said answer add the following:

IV.

This defendant avers that at the time of the commencement of this action and for a long time then next before, he was and yet is, the owner in fee and in the possession and entitled to the possession of the land and premises described in said complaint and the whole thereof.

This defendant avers that said plaintiff at the time of the commencement of this action and for a long time then next before had no right, title, interest or estate, either legal or equitable, in or to said premises or any part thereof.

Wherefore, this defendant prays judgment according to the prayer in his original answer filed herein.

A. C. FREEMAN AND
W. M. R. PARKER,
Attorneys for Plaintiff.

[Endorsed:] "Filed June 29th, 1894, T. J. Riordan, Clerk, by J. D. Kalar, Deputy Clerk."

9 In the Superior Court, County of Monterey, State of California.

Superior Court, No. 2762.

THE CITY OF MONTEREY, Plaintiff,
vs.
DAVID JACKS ET ALS., Defendants.

Complaint.

Now comes the plaintiff, the City of Monterey, by its attorney, Robert S. Forbes, and complaining of the defendants, David Jacks, John P. Lauritzen, Pacific Coast Steamship Co., J. G. Armstrong, John A. Armstrong, Edwin A. Armstrong, Ellen E. Armstrong, Michael S. Urbanus, Laura E. Howard, C. D. Field, Joseph P. Roselle, Gertrude Roselle, Catharine Gallagher, John Pashon, John and Mary Jochim, James T. Boyd, Wm. T. Welcker and Adolphus

D. Grimwood, Trustees of Estate of Cora Lyons Floyd, deceased, James Pardin, S. M. Black, Margaret L. Porter, John Doe, Richard Roe, Frank Roe, Charles Roe, Michael Doe, Frank Dick, John Dock and James Duck, for cause of action alleges:

That the plaintiff, the City of Monterey, is a Municipal Corporation of the State of California, duly incorporated and existing under the laws of said State and is the successor of the Pueblo of Monterey of Upper California.

That the defendant Pacific Coast Steamship Co. is a Corporation, incorporated under the laws of the State of California.

That the plaintiff, the City of Monterey, is the owner in fee and is entitled to the possession of the following described real estate, situate in the County of Monterey, State of California, to-wit: All those certain pieces and parcels of land as particularly described in the Patent of the United States to the City of Monterey.

TRACT No. 1.

Beginning at a post marked R. S. 3 set at the Southwest corner of the Rancho Rincon de Las Salinas on the shore of the Bay of Monterey. Thence according to the true meridian the variation of the magnetic needle being fifteen degrees east, along south boundary of Rancho Rincon de Las Salinas over rolling land.

1. South sixty-three degrees and fifteen minutes East one hundred and eighty-three chains and fifty links to a post marked R. S. 2, station.

Thence along the boundary of Rancho Las Salinas, over rolling table land.

2. South fifty-nine degrees and fifteen minutes West, one hundred and forty chains and eighty-two links to intersection of line between Ranges one and two East, Township fourteen South, Mount Diablo Meridian, thirty-four chains and twenty-eight links North of the corner to Sections twenty-four, nineteen, twenty-five and thirty, one hundred and sixty-three chains and sixty-two links to a post marked R. S., e, station on the eastern edge of said hills.

3. Thence South forty-five degrees and fifteen minutes East thirteen chains and seventy links across a small sale lake about five chains wide; twenty-eight chains sixty links to intersection of line between Ranges one and two East, in Township fourteen South, three chains and eight links North of corner to Sections twenty-four, nineteen, twenty-f[illegible]d thirty, two hundred and fifty-nine chains to station, seven [illegible] and seventy-eight links East of post, corner to Section- four, five, thirty-two and thirty-three on line between Township fourteen and fifteen South, Range two East. Thence, along said Township line crossing an oak thicket.

4. East, thirty-two chains, and twenty-two links to one quarter section, at forty-one chains and twenty-two links across oak thicket; at forty-two chains and twenty-two links crosses road from Monterey to Salinas, course North; seventy-two chains and twenty-two links to post, corner to Sections three, four, thirty-three and thirty-four; at seventy-four chains and ninety-seven

links a house bears North sixty-five degrees East; at eighty-four chains and twenty-two links the same house bears North thirty-five degrees West; at eighty-five chains and twenty-two links crosses a road; leaves table-land and descends high bank; at eighty-seven chains and twenty-two links, foot of bank and enters river bottom; one hundred and twelve chains and twenty-two links to one quarter section corner; at one hundred and thirty-eight chains and ninety-two links enters brush and timber; at one hundred and forty-nine chains and seventy-two links crosses road to Monterey, course North and South, one hundred and fifty-two chains and twenty-two links to post in mound, corner to sections two, three, thirty-four and thirty-five; at one hundred and sixty-four chains and seventy-two links leaves thick brush, and to the top of high left bank of Salinas River; one hundred and sixty-two chains and seventy-two links to middle of Salinas River, station.

13 Thence leaving the boundary of the Rancho Las Salinas and along middle of the Salinas River, up stream.

5. South fifteen degrees West thirteen chains and forty-four links to station.

6. Thence South thirty-eight degrees West twelve chains to station.

7. Thence South seventy-eight degrees and fifteen minutes West, twelve chains to station.

8. Thence South forty-four degrees and thirty minutes West, thirteen chains to station.

9. Thence South, twenty-five degrees and thirty minutes East, eight chains to station.

10. Thence South fifty-seven degrees East seven chains to station.

11. Thence South fifty-four degrees and thirty minutes East; at three chains a post upon right bank of river and marked W. P. C. 2 bears North thirty-five degrees East, distant two hundred links.

Thence along boundary of Cock's Rancho fifteen chains to station.

12. Thence South fifty-seven degrees East five chains to station.

14 13. Thence South forty-six degrees East, two chains and twenty-two links to station.

14. Thence South sixty-eight degrees East, six chains to station.

15. Thence South eighty-three degrees and thirty minutes East four chains to station.

16. Thence North, seventy-one degrees East twenty chains to the Southeast corner of Cock's Rancho, and the Southwest corner of the Nacional Rancho station, from which a post marked B. C. S. W. C. and W. P. C. 1 on right bank of river bears North thirty-seven degrees and thirty minutes East, distant five chains.

Thence along the boundary of the Nacional Rancho.

17. North sixty-three degrees East twenty-three chains to station.

18. Thence South, forty--one degrees and thirty minutes East, fifty-one chains to station.

19. Thence South, nineteen degrees West, sixteen chains to station.

20. Thence South, forty-two degrees and forty-five minutes East, seventy-two chains to station opposite the mouth of the Pilarcitos Canon on the left bank of the Salinas River Station.

15 Thence leaving the Salinas River, and up the can-on along the boundary of the Rancho El Chamisal.

21. South fifty-six degrees West, four chains to left bank of River; seven chains and ninety-five links to cottonwood tree, eighteen inches in diameter Marked M. 2, fifty-one chains to a post marked M. 3 in mound with trenches, from which an oak, twelve inches in diameter, bears South thirty degrees West, distant two hundred and ninety-three links, station.

22. Thence South seventy-one degrees and fifteen minutes West; twenty-one chains and thirty-six links to an oak two feet in diameter marked M. 4, station.

23. Thence South, fifty-five degrees and forty-five minutes West, twenty chains and twenty-one links to an oak, two feet and six inches in diameter, marked M. 5, station.

24. Thence South eighteen degrees and thirty minutes West, twenty chains and eighty-five links to an oak two feet in diameter, marked M. 6, station.

25. Thence South, twenty-nine degrees West, nine chains and seventy-seven links to an oak two feet in diameter marked M. 7, station.

16 26. Thence South, 37 degrees and 30 minutes West, 17 chains and 95 links to an oak, 2 feet in diameter marked M. 8, station.

27. Thence South 44 degrees and 30 minutes West, 23 chains and 61 links to an oak 2 feet in diameter, marked M. 9, station.

28. Thence South 48 degrees and 15 minutes West, 70 chains and 33 links to an oak one foot and 6 inches in diameter marked M. 10, station.

29. Thence South, 7 degrees and 30 minutes West, 32 chains to an oak 2 feet in diameter marked M. 11, station.

30. Thence South 45 degrees West, 45 chains to a post marked M. 12 in mound with trenches, station.

31. Thence South 28 degrees and 45 minutes West, 65 chains and 20 links to an oak one foot in diameter marked M. 13, station in Puerta Suelo. Thence descending gradually.

32. South 72 degrees and 30 minutes West, 21 chains to Northeast corner of a large, dry lake at post marked L. S. 10 and M. 14 in mound, with trenches at Northeast corner of Rancho Laguna Seca.

17 Thence leaving the boundary of the Rancho El Chamisal, and along the Northern boundary of the Rancho Laguna Seca, according to the true meridian, the variation of the magnetic needle being 15 degrees and 15 minutes East.

33. South 78 degrees and 30 minutes West; 13 chains and 23 links to the Northwest corner of dry lake, thence ascending at 23 chains and 73 links top of ascent and 44 chains and 73 links begin descending; at 56 chains and 73 links foot of descent; 59 chains and 73 links to an oak tree marked L. S. 9, at the head of a canada, course South, station. Thence ascending.

34. South 76 degrees and 30 minutes West at 15 chains top of ascent, thence over broken chamiscal hills, 143 chains to post at in-

tersection of line between Ranges one and two East, in Township 15 South, 4 Chains North of corner to Township 15 and 16 South; 161 chains to post at intersection of line between Townships 15 and 16 South, Range One East, 17 chains and 80 links West of corner to Ranges One and Two East; one hundred and ninety chains to post marked L. S. 8 and S. 4 in mound with trenches station.

Thence leaving the line of Rancho Laguna Seca, and following the Northeastern boundary of Saucito Rancho, over ruling
18 Chaparral lands, according to the true meridian, the variation of the magnetic needle being 15 degrees East.

35. North 58 degrees and 30 minutes West, 13 chains to post marked S. and Sections 1 and 36 in mound with trenches at intersection of line between Townships 15 and 16 South, Range 1, East 57 chains West of line between Ranges 1 and 2 East, at 107 chains and 70 links leave Chaparral and descend; 113 chains and 70 links foot of descent, and enters a can-on, course North and South; 118 chains and 70 links to post marked S. 3 and N. B. 4 in a stone mound, station near the remains of an old stone mound on the West side of the can-on.

Thence leaving line of Saucito Rancho and following that of Rancho Nuche Buena, according to the true meridian, the variation of the magnetic needle being 14 degrees and 30 minutes East.

36. North 20 degrees and 15 minutes East; at 15 chains leaving can-on, course Northwest, and ascends; at 24 chians top of ascent; thence over rolling chaparral hills; at 350 chains leave chapparral and enter scrub oak timber; 370 chains and 50 links to post marked N. B. 5 in mound with trenches; station from which an oak
19 marked B. T. N. B. 5 bears North 66 degrees and 15 minutes East distant 68 links.

37. Thence West, 30 chains leaves scrub oak timber and enters chamisal; 96 chains to post marked N. B. 1 in an old stone monument close to the Santa Cruz road which runs Northeast, station at the point called Divisidero.

Thence over rolling barren sand hills.

38. South 31 degrees and 50 minutes West, at 250 chains, enters timber; at 286 chains the North West corner of a large dry lagoon is about 5 chains to the left of the line; at 310 chains the Southwest corner of the laguna is about 4 chains to the left of the line; at 326 chains a road, course West 327 chains to an old stone monument 3 feet and 6 inches high, 2 feet thick, by the side of an oak tree 2 feet in diameter, marked N. B. 2, station.

39. Thence South 46 degrees East, at 40 chains leaves timber and enters chaparral, at 58 chains a road, course West by North, 110 chains and 80 links to a post marked N. B. 3 and S. 2 in an old stone monument 3 feet and 6 inches thick and 1 foot and 6 inches thick, station.

Thence leaving line of Rancho Noche Buena and following
20 that of Saucito Rancho, over low chaparral hills, according to the true meridian, the variation of the magnetic needle being 15 degrees East.

40. South 32 degrees and 15 minutes West; at 39 chains and 56

links leaves chaparral hills; at 55 chains and 92 links post marked S. and Sections 33, 34 in mound with trenches at intersection of line between Townships 15 and 16 South, Range one East, 6 chains East of corner to Sections 3, 4, 33 and 34 at 63 chains and 56 links crosses Monterey and San Juan road, course East; 64 chains and 56 links to an oak 2 feet and 6 inches in diameter with a cross cut in it and marked S. 1 and A. 3, Station four which post marked S. 6 bears South 32 degrees and 15 minutes West, distant 74 chains and 44 links.

Thence leaving line of Saucito Rancho and following that of Rancho Agnajito.

41. North 25 degrees and 15 minutes West, at one chain crosses Monterey and San Juan road, course East, at 8 chains and 8 links intersection of line between Townships 15 and 16 South, Range one East, two chains and 5 links West of corner to Sections 3, 4, 33 and 34; twenty chains to Canada, course Northwest, thence crosses
21 same 28 chains to a large stone mound on the point of a stony bluff, on the Northeast side of the Canada, station.

Thence along the Northeastern edge of the canada to low chamisal brush.

42. North 56 degrees and 45 minutes West, 60 chains and 60 links to a live oak tree one foot diameter, marked A. No. 2, station.

43. Thence N. 75 degrees W., at one chain and 50 links canada; at 4 chains and 50 links across the same, course Northwest, thence crossing timbered table-land; at 17 chains crosses a canada 3 chains wide, course Northwest and Southeast at 18 chains and 50 links crosses Monterey and San Juan stage road, course Northwest and Southeast, at 51 chains and 50 links leaves timber; thence along and near the old road to the North of same; at 66 chains and 50 links descends bank of slough; 95 chains and 60 links to a live oak tree 16 inches in diameter, marked A. No. 1, standing on the North edge of the road and on the east side of the Canada de Boracas Station.

44. Thence South 41 degrees West, at 15 chains across the Canada; thence on sloping table-land; at 101 chains, intersection of line between Townships 15 and 16 South, Range 1 East, 20
22 chains and 10 links East of corner to Sections 1, 6, 31 and 36; 118 chains and 60 links to a point on the line of the Rancho El Pescadero, from which a stone 2 feet and 6 inches long, by 6 inches diameter set in the ground at a spring bears North 41 degrees West, distant 2 chains and 50 links.

Thence leaving the line of the Rancho Aguagito and following that of the Rancho El Pescadero, according to the true meridian, the variation of the magnetic needle being 14 degrees and 30 minutes East.

45. North 34 degrees and 30 minutes West, 196 chains and 40 links over rolling hills and scattering pine timber to station on the Southeastern boundary of the Rancho Punto de Pinos. Thence following said boundary, according to the true meridian, the variation of the magnetic needle being 15 degrees East.

46. North 58 degrees East 140 chains and 70 links over low hills covered with thick brush and scattering pine timber to a post in stone

mound on the rocky point of the shore of Monterey Bay known as Point Arilones Station.

Thence along the shore of the Bay of Monterey.

47. South 3 degrees and 45 minutes East 3 chains and 45 links to station.

23 48. Thence South 36 degrees and 45 minutes East, 31 chains to station.

49. Thence S. 35 degrees and 30 minutes West, 3 chains to station.

50. Thence S. 6 degrees and 15 minutes East, 7 chains to station.

51. Thence S. 61 degrees and 15 minutes E., 4 chains to station.

52. Thence S. 27 deg. E., 17 chains and 50 links to a post marked U. S. R. M. R. 1. in stone mound station, at the Northeast corner of the U. S. Military Reservation at Monterey. Thence leaving sea shore, and along boundary of said reservation, according to the true meridian, the variation of the magnetic needle being 16 degrees East.

53. N. 89 deg. and 30 minutes W. at 9 chains crosses road course, North and South; at 10 chains and 58 links a fence bears North and West; at 26 chains and 80 links, a pine tree 3 feet in diameter, (old line tree); at 30 chains Mr. Hallock's grave is 150 links South of line; at 49 chains and 50 links intersection of Mount Diablo Meridian lying in Township 15 S. 7 chains and 10 links North of corner to Sections 24, 19, 25, and 30; 60 chains and 60 links to a

24 redwood post marked U. S. M. R. No. 2, in stone mound from which a pine 8 inches in diameter bears N. 31 degrees E., distant 28 links, station.

54. Thence S. at 24 chains and 70 links crosses a ravine, course Southeast; 26 chains and 32 links to a redwood post in mound with pits, station from which an oak 8 inches in diameter bears N. 85 degrees East; distant 27 links.

55. Thence N. 82 degrees E., at 3 chains and 15 links crosses a ravine, course Southeast; at 37 chains crosses same ravine, course Northeast; at 43 chains and 67 links crosses same ravine, course Southeast; 44 chains and 52 links to an oak 18 inches in diameter marked U. S. M. R. O. standing on the left bank of the ravine station.

Thence along ravine down stream.

56. N. 70 deg. E., 5 chains and 40 links to an oak 20 inches in diameter marked U. S. M. R. No. 4 standing on the left bank of same ravine station.

57. Thence S. 82 deg. and 30 minutes E., 1 chain and 45 links to an oak 18 inches in diameter, marked U. S. M. R. 5, station.

58. Thence S. 52 deg. E., 3 chains and 60 links to an oak

25 8 inches in diameter marked U. S. M. R. 6 standing on right bank of ravine station.

59. Thence S. 82 deg. E. 2 chains and 55 links to an oak 30 inches in diameter marked U. S. M. R. 7 on right bank of ravine station.

60. Thence S. 61 deg. and 15 minutes East, 2 chains and 80 links to an oak stump 10 inches in diameter marked U. S. M. R. 8, standing on right bank of ravine station.

Thence along center of ravine, according to the true meridian, the variation of the magnetic needle being 16 deg. and 5 minutes E.

61. S. 88 deg. and 25 minutes E., one chain and 11 links to station in bottom of ravine, with very small stream of water.

62. Thence N. 54 deg. and 20 minutes East, 1 chain and 22 links to station.

63. Thence N. 81 deg. and 20 minutes East; at 46 links to 69 links, crosses under bridge of main road leading to the Pacific Grove Camp Ground; at 2 chains ravine widens out into beach, 3 bathing houses being in the opening to left and about 80 links distant; 3 chains and 30 links to station near lower end of bathing beach.

64. Thence S. 40 degrees and 25 minutes East; at one
26 chain and 25 links leaves beach and thence over rocky bluff some 15 feet high; 2 chains and 60 links to station.

65. Thence S. 48 deg. and 55 minutes E., 2 chains and 16 links to station at Northeast corner of small bathing house.

66. Thence S. 48 deg. and 55 minutes East, 2 chains and 16 links to station at Northeast corner of small bathing house.

66. Thence S. 7 deg. and 20 minutes East, one chain and 13 links to a sawed redwood post, four inches by 4 inches marked C. H. R. 1 in large mound of rock, station standing at the Northernmost corner of the Custom House Reservation, and being the general center line of Main and Alvarado streets, after their junction in Scott street.

Thence along the West boundary of the Custom House reservation.

67. S. 2 degrees and 30 minutes, W. 3 chains and 6 links a redwood underground monument, 6 inches by 6 inches buried 8 inches below the surface of the ground, from which the timber at the N. W. corner of the old Custom House just under the flag staff and marked W. P. C. H. R. 2 bears N. 89 deg. and 50 min. West, 37 links distant; 6 chains and 6 links to the intersection of said center line
27 with the North boundary (prolonged) of the original Talbot and Green lot, station, from which a redwood underground monument, 6 inches by 6 inches in the N. line of Scott street bears S. 2 degrees and 30 min. West 17 links, and a sawed redwood monument 4 inches by 4 inches, marked W. P. C. H. R. standing at the northwest corner of Captain Lambert's wooden house, bears S. 82 deg. and 15 minutes East, 62½ links. Thence along Southerly boundary of the Custom House Reservation, and Westerly prolongation of the Northerly boundary of said Talbot and Green's lot.

68. S. 79 deg. and 30 minutes E., at 78 links and Northwest corner of said Talbot and Green's lot 1 chain and 28 links to a sawed redwood post, in mound of rocks marked C. H. R. 3 station, and standing at the edge of the low rocky bluff above the sand beach, stretching toward the Railroad Depot.

Thence along said sandy beach.

69. S. 52 deg. E., 2 chains and 18 links to station.

Thence along the shore of the Bay of Monterey.

70. S. 64 deg. and 45 minutes East, 16 chains to station.

28 71. Thence S. 89 deg. and 15 minutes East, 26 chains to station from which church at Monterey bears S. 42 deg. and 15 minutes W.

72. Thence N. 78 deg. and 15 minutes E., 34 chains to station.
73. Thence N. 60 deg. and 15 minutes E., 50 chains to station.
74. Thence N. 48 deg. and 15 minutes E., 42 chains to station from which church at Monterey bears S. 56 deg. and 15 minutes W.
75. Thence N. 39 deg. and 30 minutes E., 74 chains to station.
76. Thence N. 32 deg. and 45 minutes E., 60 chains to station.
77. Thence N. 27 deg. and 15 minutes East, 110 chains to station.
78. Thence N. 21 deg. E., 94 chains to meander post on line between Townships 14 and 15 S., Range 1 E. 28 chains and 35 links W. of corner to Sections 1, 2, 35, and 36; 120 chains to station.
79. Thence N. 15 deg. and 40 minutes E. 110 chains to station.
80. Thence N. 9 deg., E. 24 chains to station.
81. Thence N. 8 deg. and 15 minutes East, 118 chains to station.
29 82. Thence N. 6 deg. E., 64 chains to station.
83. Thence N. 4 deg. E., 15 chains and 20 links to place of beginning.

Co. Boundaries with the State House Reservation Connecting Line.

Beginning at S. W. corner of the Custom House Reservation. Thence S. 10 deg. and 12 minutes W., 29 chains and 18 links to underground monument S. H. R. 6 at Northwest corner of State House Reservation.

Thence according to the true meridian, the variation of the magnetic needle being 16 deg. and 5 minutes E., along the Westerly line of said Reservation, being along the center line of California street.

84. S. 34 deg. and 40 minutes E., at 2 chains and 96 links an old wooden bridge over ravine; at 3 chains and 81 links cross same; at 4 chains and 97 links in line with prolonged Northwest line of old State House, 59 links from corner of adobe wall; at 8 chains and 38 links intersects Northern line of Webster st., at a 6 inch by 6 inch underground redwood monument, marked W. S. H. R. 5 eight chains and 78 links to point of intersection of center line of California
30 st. with center line of Webster st. station, from which monument W. S. H. R. 5 bears N. 34 deg. and 40 minutes W., distant 40 links; and the Southwest corner of the adobe wall of State house bears N. 22 deg. and 30 minutes E. 71½ links distant.

Thence along Southerly boundary of the State House Reservation and center line of Webster street.

85. N. 72 deg. and 53 minutes E., 2 chains and 3 links to an underground redwood monument 6 inches by 6 inches marked S. H. 4 station, from which a 4 inch by 4 inch sawed redwood witness post standing in the N. line of Webster st., bears N. 35 deg. and 35 minutes W., distant 58 links. Thence along Easterly boundary of State House Reservation.

86. N. 35 deg. and 35 minutes W., at 2 chains and 5 links corner of remains of old rock and adobe wall land-mark pointed out by witnesses as government extent of State House Yard, one remaining wing extending 40 links to Northeast; at 2 chains and 29 links

N. end of remains of wall, at 3 chains and 10½ links crosses fence, course N., 54 deg. and 50 minutes E., thence along a board fence 7 feet high 4 chains and 75 links to a 4 inch by 4 inch sawed redwood post, in mound marked S. H. R. 3, station at end of an alley way.

31 Thence along Southwest end of said alley way.

87. S. 58 deg. W., 12 links to a sawed 4 inch by 4 inch redwood post, in mound marked S. H. No. 2, station in center line of said alley way.

Thence along the center line of said alley way 24 links wide.

88. N. 33 deg. and 53 minutes W., at 75 links a wooden bridge spanning ravine 15 links wide; at one chain and 22 links across said bridge; at 2 chains and 8 links opposite South Jail wall; at 2 chains and 50 links North Jail wall; 3 chains and 54 links to a six inch by six inch redwood underground monument marked S. H. R. 1 station at point of intersection of center line of alley with general center line of Pearl st., from which a four inch by 4 inch sawed redwood witness post in mound of rock, marked W. P. S. H. R. 1 standing at the Northernmost corner of the adobe building formerly the Alcalde's office bears S. 29 deg. and 55 minutes W., 53 links distant, and the Southwest corner of the Castro building bears N. 39 deg. and 20 minutes E. 53½ links distant.

Thence along the general center line of Pearl street.

32 89. S. 87 degrees and 25 minutes W. 2 chains and 6 links to the place of beginning.

Containing twenty-seven thousand nine hundred and thirty-six and sixty-four onehundredths acres, without the State House Reservation.

Tract No. 2.

Connecting Line with Tract No. 1.

Beginning at the established corner Number 10 of the Rancho Laguna Seca, the same being Number fourteen of Tract Number 1 of the City Lands of Monterey.

Thence according to the true meridian, the variation of the magnetic needle being 16 degrees East; South 32 degrees and 32 minutes West; at 2 chains and 5 links edge of Laguna; at 27 chains and 79 links leaves Laguna; at 29 chains and 69 links top of ridge, bearing North 46 degrees West, and South 46 degrees East; thence gradually descending across rolling hills and spins about 5 chains East of a cañon; at 60 chains and 20 links an oak post 4 inches by 4 inches and 3 feet long from which corner to Sections 3, 4, 33 and 34, Townships 15 and 16 South, range 2 East Mount Diablo Meridan, bears East 74 chains and 5 links distant; at 94 chains old road leading from Monterey, and edge of dry lagoon (so-

33 called) but now containing water; at 99 chains and 67 links leave water of lagoon 100 chains and 7 links to stake in new road leading from Monterey to San Juan.

Thence gradually ascending South 8 degrees and 45 minutes

West; at 44 chains and 79 links crosses fence; 45 chains and 31 links to intersection with Southerly boundary line of the Laguna Seca Rancho, at a redwood stake 3 feet long, 4 inches by 4 inches, marked M. C. No. 2 on North side, and one on South side, in mound of earth 1 foot and 6 inches high, and 3 feet wide, station No. 1 and initial point of the survey of Tract No. 2.

Tract No. 3.

Commencing at a post marked M. 1 standing on the shore of the Bay of Monterey, at the mouth of the Salinas River.

Thence meandering the left bank of said River up stream according to the true meridian, the variation of the magnetic needle being 15 degrees East.

1. North 54 degrees East 9 chains and 53 links to station.
2. Thence South 30 minutes East, 26 chains to station.
3. Thence South 23 degrees East, 49 chains to station.
4. Thence South 2 degrees and 30 minutes East, 13 chains to station.
5. Thence South 26 degrees and 45 minutes West, 30 chains to station.
6. Thence South 14 degrees and 30 minutes West, 43 chains to station.
7. Thence South, 17 degrees and 30 minutes West, 20 chains to station.
8. Thence South 3 degrees West, 21 chains to station.
9. Thence South, 13 degrees and 15 minutes East, 9 chains to post marked R. S. 7, station, at the Northeast corner of the Rancho Rincon de las Salinas.

Thence along North boundary of said Rancho.

10. West 7 chains and 18 links to post marked W. P. R. S. 6, 8 chains and 18 links to the Northwest corner of the Rancho Rincon de las Salinas, station on the shore of the Bay of Monterey.

Thence along the shore of the Bay of Monterey.

11. North, 8 degrees and 30 minutes East, 11 chains to station.
12. Thence North, 13 degrees and 15 minutes East, 90 chains to station.
13. Thence North 18 degrees and 15 minutes East, 25 chains to station.
14. Thence North, 13 degrees and 30 minutes West, 25 chains to station.
15. Thence North one degree and 15 minutes West, 21 chains to station.
16. Thence North 16 degrees and 30 minutes West, 30 chains to point of beginning.

Containing one hundred and ten and ninety one-hundredths acres.

Tract No. 4.

Connecting with Tract No. 2 of the City Lands of Monterey.

Beginning at stake M. C. 2.26 and S. R. of survey of Tract No. 2 previously described.

Thence along ridge and South boundary line of Saucito Rancho, North 86 deg. and 45 minutes West; at 5 chains and 75 links, crosses a cañon, course South 38 degrees West, about 2 chains to a small Lagoon 26 chains and 25 links to a redwood stake 4 inches by 1 inches, and 3 feet long, marked M. C. No. 2 and 27 on South
36 side, and S. R. on North side, being point of beginning, from which a pine tree, 3 feet in diameter, marked M. C. No. 2 S. R. and 27 B. T. bears North 89 degrees West, 85 links distant, and corner No. 5 of Saucito Rancho, bears South 86 degrees and 45 minutes East, 107 chains and 50 links distant. Thence leaving Saucito Rancho boundary to the North and continuing along ridge.

1. South 46 degrees and 15 minutes West, 4 chains and 46 links to a redwood stake 3 inches by 3 inches, four feet long, marked on North side M. C. No. 2 and on the South side 28, in mound of earth, 2 feet high and 4 feet base, station. Thence along ridge.

2. S. 67 degrees and 30 minutes West, 10 chains and 30 links to an oak stake, 4 inches by 4 inches, 4 feet long, marked M. C. No. 2 on North side, and 29 on South side, in mound of earth 2 feet high, and 3 feet base, station.

3. N. 79 deg. and 15 minutes West, 13 chains and 83 links to an oak stake 4 inches by 4 inchs, 4 feet long, marked M. C. No. 2 on North side, and 30 on South side in mound of earth 2 feet high and 4 feet wide at base, station. Thence along ridge.

4. North 23 degrees and 30 minutes West, 6 chains and 69 links to intersection with the South boundary of Saucito Rancho,
37 at a redwood stake 4 inches by 4 inches, 4 feet long marked on North side S. R. and on South side M. C. No. 2 and 31, station, from which a live oak tree 12 inches in diameter, marked M. C. 2 and 31 and S. R. B. T. bears north 20 degrees east 310 links distant and a post in fence around a spring bears North 42 degrees and 45 minutes West, 5 chains and 5 links distant.

From this station the Southwest corner of Saucito Rancho bears North 86 degrees and 45 minutes West, 96 chains and 24 links distant. The general course of the main ridge from this station is North, 37 degrees West, for about 15 chains, and then bears gradually more towards the West. This is also the most Westerly point of the main ridge on the North line of Monterey City Land Tract Number 2 as previously surveyed.

5. Thence South 86 degrees and 45 minutes East, 29 chains and 26 links along the South boundary of Saucito Rancho to point of beginning.

Containing fifteen and ninety-six one-hundredths acres.

Plaintiff alleges that the defendants claim and that each of them claim-, an estate or interest in said land and premises adverse
38 to the plaintiff and that such claims are without any right whatever; that said defendants have not and that neither of them has any estate, right, title or interest in or to the above described land and premises or any part thereof; and the plaintiff desires to have the same determined.

Plaintiff alleges that the defendants are in the possession of said land and premises.

That the true and real names of the defendants John Doe, Richard Roe, Frank Roe, Charles Roe, Michael Doe, Frank Dick, John Dock and James Duck, are not known to the plaintiff, and plaintiff designates them by fictitious names and prays that when their true and real names are ascertained the same may be inserted herein and in all further proceedings in this action in lieu of said fictitious names with proper and apt words to charge them respectively.

That the value of the rents and profits of the said land and premises is $500 per month.

Wherefore, plaintiff prays that the defendants and each of them be required to set forth the nature of his claim; that all adverse claims of the defendants and each of them in and to said lands and premises may be determined by the decree of this Court; that by said decree it be declared and adjudged that the defendants have not
39 and that neither of them has any estate or interest whatever in or to said land and premises; that the plaintiff is the owner thereof, and that the title of plaintiff thereto is valid. That plaintiff have and recover the possession of said land and premises and have writ of possesion therefor. That the plaintiff have judgment for the sum of $500 per month for the value of the rents and profits for the withholding of the possession of the said lands and premises from the commencement of this action until the entry of judgment herein, together with costs of suit and such other and further relief as may be just.

ROBERT S. FORBES,
Attorney for Plaintiff.

W. C. BELCHER,
EDWARD J. PRINGLE,
Of Counsel.

[Endorsed:] "Filed, Nov. 17, 1896. T. J. Riordan, by J. D. Kalar, Deputy Clerk."

40 [Title of Court and Cause.]

Answer of Defendant Jacks.

(Superior Court, No. 2762.)

Now comes the defendant David Jacks answering the complaint filed herein against him and for such answer denies and avers as follows:

I.

He denies each and every allegation in the said complaint contained, and avers that he is the owner in fee of all the land therein described.

II.

He avers that the plaintiff is that City of Monterey which was the successor of the pueblo of Monterey of Upper California, and all acts to incorporate said City of Monterey and all acts amendatory thereof were repealed by an Act of the Legislature of the State of California entitled "An Act to repeal an Act entitled 'An Act to incorporate the city of Monterey, approved May 11, 1853, and acts amendatory thereof approved March 4, 1857, April 16, 1862, and April 2, 1866,' approved March 16, 1889." That no other acts or statutes exist incorporating the City of Monterey, or any
41 City of Monterey, save and except the repealed statutes hereinbefore set forth; and that the plaintiff has no capacity to sue nor to maintain this action, for that the plaintiff is not incorporated under any of said statutes, nor otherwise, nor in any manner, nor by any means whatsoever.

III.

The defendant further avers that the plaintiff's cause of action is barred by the provisions of Section 318 of the Code of Civil Procedure of said State, and that plaintiff's cause of action is further barred by the provisions of Section 319 of the Code of Civil Procedure of said State.

Wherefore, this defendant prays to be dismissed hence with his costs of suit herein expended.

April 12, 1899.

FREEMAN AND BATES,
Attorneys for Defendant David Jacks.

[Endorsed:] "Filed, April 17th, 1899. J. D. Kalar, Clerk."

42 *Dismissal as to Certain Defendants.*

In the Superior Court of the County of Monterey, State of California.

Superior Court, Nos. 1850 and 2762.

THE CITY OF MONTEREY, a Corporation, Plaintiff,

vs.

DAVID JACKS, JOHN P. LAURITZEN, PACIFIC COAST STEAMSHIP COMPANY, J. G. ARMSTRONG, EDWIN A. ARMSTRONG, ELLEN E. ARMSTRONG, MICHAEL S. URBANUS, LAURA E. HOWARD, C. D. FIELD, JOSEPH P. ROSELLE, GERTRUDE ROSELLE, CATHERINE GALLAGHER, JOHN PASHON, JOHN and MARY JOCHIM, JAMES T. BOYD, WM. WELCKER and ADOLPHUS D. GRIMWOOD, Trustees of the Estate of Cora Lyons Floyd, Deceased; JAMES BARDIN, S. M. BLACK, MARGARET L. PORTER, JOHN DOE, RICHARD ROE, FRANK ROE, CHARLES ROE, MICHAEL DOE, FRANK DICK, JOHN DOCK, and JAMES DUCK, Defendants.

The above entitled action is hereby dismissed as to the defendants John P. Lauritzen, Pacific Coast Steamship Company, Edwin A. Armstrong, J. G. Armstrong, Ellen E. Armstrong, Michael S. Urbanus, Laura E. Howard, C. D. Field, Joseph P. Roselle, Gertrude Roselle, Catharine Gallagher, John Pashon, John and Mary
43 Jochim, James T. Boyd, Wm. Welcker and Adolphus D. Grimwood, Trustees of the Estate of Cora Lyons Floyd, deceased, James Bardin, S. M. Black, Margaret L. Porter; and the Clerk of the Superior Court of the County of Monterey is hereby directed to enter the dismissal of said cause as to said defendants.

Dated May 24th, 1899.

ROBERT S. FORBES,
Attorney for Plaintiff.

Of Counsel:
PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK.

[Endorsed:] "Filed, May 26, 1899. J. D. Kalar, Clerk, By F. W. Sargent, Deputy."

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

(Superior Court Nos. 1850 and 2762.)

This cause having heretofore been tried, argued and submitted, the Court, now being fully advised, finds and decides:

I.

That the plaintiff is a municipal corporation incorporated subsequently to March 16, 1889, and prior to the commencement of this action.

44 II.

That the plaintiff was not, at or prior to the commencement of this action, the owner, nor entitled to the possession of any part of the land described in its complaint, but on the contrary the defendant David Jacks was, at the filing of such complaint and still is, in the possession of said land and the owner of the whole thereof

III.

That the plaintiff's cause of action is not barred by the provisions of Sections 318 and 319 of the Code of Civil Procedure of said State, or either of them, nor otherwise.

As conclusion of law the Court finds that the plaintiff is not entitled to any relief herein, and that the defendant David Jacks is entitled to judgment that he go hence without day and that he recover his costs of suit herein expended.

Let judgment be entered accordingly.

Dated, September 27th, 1899.

N. A. DORN,
Judge of the Superior Court.

[Title of Court and Cause.]

Decree.

(Superior Court Nos. 1850 and 2762.)

45 The Court having heretofore made and filed its decision herein directing judgment to be entered in favor of the defendant;

It is, therefore, by the Court, ordered, adjudged and decreed, that the plaintiff is not entitled to any relief in this action and is not the owner of any of the real property described in its complaint, and that the defendant David Jacks go hence without day and have and recover his costs of suit herein expended, hereby taxed at..... dollars.

Dated September 27th, 1899.

N. A. DORN,
Judge of the Superior Court.

[Title of Court and Cause.]

Notice of Intention to Move for New Trial.

(Superior Court Nos. 1850 and 2762.)

(For text, see Bill of Exceptions, page 25, folios 375–378.)

[Endorsed:] "Filed, October 12th, 1899, J. D. Kalar, County Clerk."

[Title of Court and Cause.]

Notice of Appeal from Judgment.

(Superior Court Nos. 1850 and 2762.)

To the defendant above named, and to John Flournoy, Esq., his Attorney:

46 You will please take notice, that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of California from the judgment entered in the said Superior Court in the above entitled cause in favor of the said defendant and against said plaintiff, and from the whole thereof.

San Francisco, Nov. 24th, 1899.

R. S. FORBES,
Attorney for Plaintiff.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel.

[Endorsed:] "Filed Nov. 25th, 1899, J. D. Kalar, Clerk."

47 [Title of Court and Cause.]

Plaintiff's Bill of Exceptions on Motion for New Trial and on Appeal.

(Superior Court Nos. 1850 and 2762.)

Be it remembered that this cause came on to be tried before the Court on the 9th day of May, 1899, a trial by jury having been waived by the respective parties. Messrs. Pringle & Pringle and W. B. Treadwell appeared for the plaintiff, and Messrs. Freeman and Bates and D. M. Delmas appeared for the defendant; whereupon the following proceedings were had:

The plaintiff offered and read in evidence certified copies of the following documents: the petition of the City of Monterey to the Board of Commissioners to ascertain and settle private land
48 claims in the State of California; the proceedings of the Territorial Deputation setting apart the Pueblo lands to the City

of Monterey; the opinion of the said Board of Commissioners; the decree of confirmation by said Board of Commissioners, the notice of appeal by the United States to the District Court of the Southern District of California from said decree of confirmation; and the abandonment of said appeal, with leave by the Court to proceed under said decree as upon a final decree; which papers were as follows:

Proceedings of Territorial Deputation Setting Apart the Pueblo Lands to the City of Monterey.

"Session of the 23rd of July.

* * * * * * *

Following the President said that with date of the 15th of December, 1826, he published a Proclamation in the Territory to the effect as to what Article 12th of Chapter 3rd of the decree of the Cortes of the 23rd of June, 1813, provides relative to the establishing of Ayuntamientos in the Presidios of Monterey and Santa Barbara, notwithstand the inaptitude of the persons in these places to take charge of such offices, but to whom nevertheless he has already commenced to teach the required knowledge in that kind of political authority not before enjoyed by them, with the hope that when the Ayun-
49 tamientos were duly installed there might be persons sufficiently instructed in the duties that to them might be committed by the laws. It being then in the attributions of the deputation to formally establish them as per previous and corresponding information, and in accordance to Article 1st of Chapter 2d of said decree, he asks that it proceed to consolidate this of Monterey for which object he demanded from the acting Alcalde the Poll list of the inhabitants in this jurisdiction from which it results that with its adjoining Ranchos there are more than one thousand souls, and that in view of all that is shown that this Corporation proceed to take all the comformable steps to frame the advisory record of proceedings that the law provides, commencing to designate the common lands to the population, and that on its part recommend that notice be taken of the Ranchos, the first is that belonging to the Public Treasury and holds it to date as its property for the breeding of its cattle and support, acquired by the way of loans or tithes, and wherefrom it is taken for the succor of the troops, the second is that where the company has always maintained its horses; that these places are too near the town, and asks they may be separated from what may be proposed from the Common lands of the Pueblo; to which
50 the corporation answered that in the following session of tomorrow would continue the subject.

Following, the President exhibited an official communication from the Commander of the Presidio San Diego Don Santiago Arguello, in which he states to his Excellency the Political Chief as having disposed that from the funds of that municipality their [there] be paid to an individual that came there and took charge of the School, the sum of Twenty dollars per month from the 15th of April last past;

recognizing the circumstances of the person, and that he adds to his mentioned calling of teaching to read, and write, to the children, that of Arithmetic, and that he agrees to the condition that he is to get twenty dollars, meanwhile his Excellency the Political Chief will be responsible for the five dollars more than he asks.

The corporation resolved that the twenty dollars be paid monthly, until through a report is shown the advancement made by the children, when if favorable his salary will be raised as he asks. This concluded the act to which the four members of the former session assisted.

JOSE MA. DE ECHANDIA.
JOSE TIBURCIO DE CASTRO.
CARLOS CASTRO.
ANTONIO BUELNA.
SALVIO PACHECO.
JUAN BAUTA. ALVARADO, *Secretary.*

51 Session of the 24th of July.

Having read and approved the previous act, following proceeded to treat with regard to the Common lands that the corporation proposes for the Town of Monterey, and the foregoing demarcations made by Senor Castro were approved. From the mouth of the River of Monterey where it empties into the sea to the place of the Pilarcitos; from the following along the Canada to the Laguna Seca, which lies in the principal road to the Presidio; from this taking all the summit of the mountain that is situated toward the Mission of San Carlos to the Point of Cypresses further to the North; and from said point following all the Coast to the already mentioned mouth of the River of Monterey.

It was also spoken with regard to the Department, and its seat of Government, which it should be Monterey, on account of its relativeness to the attributions of the Ayuntamiento and its Alcalde, and its further discussion being postponed for the following session, the act was concluded to which assisted all the members of the former.

JOSE MA. DE ECHANDIA.
JOSE TIBURCIO DE CASTRO.
CASTRO.
ANTONIO BUELNA.
SALVIO PACHECO.
JUAN BATA ALVARADO, *Secretary.*"

52 [Endorsed:] B. No. 714. Belonging to No. 714, Petition of Monterey City Lands. Filed in Office March 2nd, 1853. Geo. Fisher, Sec'y. A. P. L. Exhibit to the deposition of Juan B. Alvarado, January 19th, 1855. Recorded in Rec. of Evid. Vol. 18, p. 740 & 741."

Petition of the City of Monterey to the Board of Commissioners to Ascertain and Settle Private Land Claims.

"To the Honorable Board of Commissioners to Ascertain and Settle Private Land Claims in the State of California:

Petition.

Your petitioners, the corporate Authorities of the City of Monterey, a municipal corporation of said State respectfully show unto your Honorable Board on the 7th day of July, Eighteen Hundred and Forty-six and long previously thereto, it existed as a City.

That for many years previous to the acquisition of California by the United States it was the Mexican Capital and the seat of
53 the Civil and Military Government of the Territories now comprising this State.

And it was incorporated by a decree of the Cortes on the 23rd of June, A. D. 1813, and that the Grant of land which was made to it was all the land within the following boundaries, to-wit:

Commencing at the mouth of the Monterey River (now called the Salinas) in the sea and running thence to the place well known as the Pelarcitos, thence running along a well-known hollow or canada to the Laguna Seca, a place well known on the high road to the Presidio of Monterey.

Thence following along the highest ridge of the Mountains towards the Mission of San Carlos to the North side of a well-known point called Point Cypress following all the course of the sea to the place of beginning at the mouth of the said river of Monterey or Salinas, containing about — leagues, more or less.

That such boundaries were expressly conceded, ratified and confirmed unto the said corporation of Monterey on the 24th of July in the year 1830 by the Mexican Departmental Legislature of the country in conformity with the laws of the Mexican Nation and that all the claims and rights of property acquired by the said
54 corporation under the Mexican Government have under the laws of this State become vested in the said City of Monterey and that the said tract of land was granted and conceded to the said City of Monterey under the authority and in accordance with the laws, usages and customs of the Government of Mexico then in force over the Territory and your Petitioners further show that at the time said Grant was made and confirmed unto the said City there was no intervening claim existing thereto, but that since that period Grants of land have been made of portions of the said land belonging to the said City, but of the particular dates authority equity or legality or nature or extent of such subsequent Grants, your petitioners do not possess the necessary information and are therefore unable to set forth the same.

Wherefore they pray your Honorable Board to confirm the title of the said corporation to the lands within the boundaries aforesaid subject to all such legal rights to portions thereof as may have been

acquired within the said boundaries or any part or portion of them by any private person or persons whomsoever. Your Petitioners further show that the Grant itself which was made to the said corporation is lost, but that proof of its confirmation and that
55 the limits of the said Grant was fixed as aforesaid is contained, viz: the records of Journals of the Mexican Departmental Assembly of California for the year 1830 a certified copy of which from the original book now in the hands of the Surveyor General of the U. S. for California for the 23rd and 24th days of July in that year is hereto attached marked "A" with a certified translation marked "B."

They therefore ask the confirmation of said Grant with the boundaries aforesaid subject to all and every lawful right or all and every person holding lands within the same as aforesaid.

D. M. ASHLEY,
(By WM. J. S.)
Attorneys for Petitioner.

WILLIAM J. SHAW,
Of Counsel.

Filed in office March 2nd, 1853.
GEORGE FISHER, *Secretary.*

Recorded in vol. 2nd of Petitions on pages 107, 108, 109.
GEORGE FISHER, *Secretary.*

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the Petition to the Board of Commissioners to ascertain and settle Private Land
56 Claims in the State of California in the cause entitled "The United States *vs.* City of Monterey" Pueblo Lands, No. 382, Southern District of California, now on file and of record in my office.

Attest my hand and seal of said District Court this 19th day of June A. D. 1894.

SOUTHARD HOFFMAN,
[SEAL.] *Clerk U. S. District Court, N. D. Cal."*

Opinion of the Board of Commissioners to Ascertain and Settle Private Land Claims.

"THE CITY OF MONTEREY
vs.
THE UNITED STATES.

For Pueblo Lands.

The present City of Monterey was organized at an early day, and as a Pueblo and afterwards was recognized by the Mexican law as a

City and became the Capital of California, and at the time of the conquest of the country was the seat of the political Government.

The documentary evidence in the case shows that on the 24th day of July, 1830, the common lands of the Pueblo previously assigned were approved by the Territorial Deputation with
57 clearly defined limits and boundaries, which lands have ever since, according to the testimony, been reputed and recognized as the lands of the corporation.

In the proceedings before the Deputation it was suggested that two Ranchos which were situated near the town should be excluded from the assignment of the pueblo lands; and in the petition to this Commission it is stated that certain individuals had acquired rights to some portions of the land, included within the boundaries and they propose to exclude these from the decree of confirmation.

The right of the City to the premises seems to be fully established, and we shall confirm to the corporation the area within the limits defined by the decree of the Deputation, excepting such portions thereof as are held by individual owners by right of title derived from competent authority other than said Pueblo or City.

Confirmed."

[Endorsed:] "No. 714. City of Monterey, Pueblo Lands, Opinion of the Board delivered by Commissioner Alpheus Felch. Filed in Office, January 22, 1856. Geo. Fisher, Secr'y. Recorded in 3 Vol. Decisions, E. & D. & G. p. 379. Geo. Fisher, Secr'y."

58 *Decree of Confirmation by the Board of Commissioners to Ascertain and Settle Private Land Claims.*

"THE CITY OF MONTEREY
vs.
THE UNITED STATES.

In this case, on hearing the proof and allegations, it is adjudged by the Commission that the claim of the said petitions is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in the County of Monterey and known as the Pueblo lands of the City of Monterey, and is bounded and described as follows, to-wit: From the mouth of the River of Monterey in the Sea to the Pilarcitos; thence running all along the *Canada* to the *Laguna Seca,* which is in the high road to the Presidio; thence running along the highest ridge of the mountains situated towards the Mission of San Carlos unto Point Cypress further to the North; and from said point following all the Coast unto the said mouth of the River of Monterey; excepting and reserving therefrom such portions thereof as
59 are held by individual owners by right or title derived from competent authority other than said Pueblo or City.

ALPHEUS FELCH.
R. AUG. THOMPSON.
S. B. FARNELL."

[Endorsed:] "No. 714, City of Monterey, Pueblo Lands, Decree of Confirmation. Filed in Office, January 22, 1856. Geo. Fisher, Secr'y. Recorded in 3 Vol. Decisions, E. & D. & G., p. 380. Geo. Fisher, Secr'y."

Certificate of U. S. Surveyor-General.

"OFFICE OF THE U. S. SURVEYOR-GENERAL FOR CALIFORNIA.

I, Surveyor-General of the United States for the State of California, and as such, having in my office and in my charge and custody a portion of the Archives of the former Spanish and Mexican Territory or Department of Upper California, as also the papers of the late Board of Commisisoners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law,
60 do hereby certify that the eight preceding and hereunto annexed pages, numbered from one to eight inclusive, exhibit a true, full and correct English translations from the original Spanish, and copies of the originals, as follows:

English translation from the Spanish of part of Minutes of the Territorial Deputation of Upper California of the 23rd of July, 1830, and on file in case No. 714, City of Monterey Pueblo Lands, and the same as designated on the docket of the Board of Land Commissioners, and endorsements thereon, pages from (one) to (five) inclusive.

Opinion of the Board of Land Commissioners filed in case No. 714. City of Monterey Pueblo Lands, with endorsements thereon, pages from (six) to (seven) inclusive.

Decree of Confirmation of said Board of Land Commissioners filed in case No. 714, City of Monterey Pueblo Lands, with endorsements thereon, page (eight), the originals of which are now on file in this office and in my custody; that I have carefully compared the same with the original-, and that the same is a correct transcript therefrom and of the whole of such original-.

In testimony whereof, I have hereunto signed my name
61 officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this 21st day of June, 1894.

W. S. GREEN,
U. S. Surveyor-General for California.

Translated by Valentin Alviso, Keeper of Archives."

[Endorsed:] "Plaintiff's Exhibit No. 1. Filed, June 29th, 1894. T. J. Riordan, Clerk, by J. D. Kalar, Deputy Clerk."

(End of Plaintiff's Exhibit No. 1.)

Petition of U. S. for Review.

"In the District Court of the United States for the Southern District of California. City and County of Los Angeles, State of California.

Docket No. 382. Transcript No. 714.

CITY OF MONTEREY, Appellee,
vs.
THE UNITED STATES, Appellant.

To the Hon. Isaac S. K. Ogier, Judge:

The Petition of Pacificus Ord, a resident of said City,
62 County and State, Attorney of the United States for the Southern District of California, who petitions in this behalf for the United States and being present here in Court, in the name and behalf of the United States, represents as follows: That heretofore, to wit: on or about the 2nd day of March A. D., 1853, the City of Monterey presented a petition to the Commissioners to ascertain and settle the private claims in the State of California, when sitting as a board, claiming a tract of land called Pueblo Lands in the County of Monterey, State of California, which said petitioner is referred to for a description of the land claimed, a copy of which appears in the transcript hereafter referred to. That thereafter, to wit: on or about the 22nd day of January, A. D. 1856, the said Commissioners confirmed, by final decision, the said claim of said petitioner. That thereafter, to wit: on or about the 20th day of February A. D., 1856, a duly certified transcript of the proceedings and decision of the said Commissioners in said cause, and the papers and evidence on which the said decision was founded, was filed in the office of the Clerk of the District Court of the United States for the Southern District of California, and marked No. 714; reference to which it is prayed may be had and made part of this pe-
63 tition. That on or about the first day of March, A. D., 1856, the honorable Caleb Cushing, Attorney General of the United States, received a duly certified duplicate of said transcript of the proceedings and decision of said Commissioners in said cause, and the papers and evidence on which said decision was founded. That thereafter, to wit: on or about the 30th day of April, A. D., 1856, the said Attorney General of the United States filed, or caused to be filed, in behalf of the United States, a notice with the Clerk of said District Court of the United States, that the appeal in said cause from the said decision of the said Commissioners in the District Court of the United States for the Southern District of California, would be prosecuted by the United States. Your petitioner further represents, that the land claimed, as aforesaid, is situate in the Southern District of California, and within the jurisdiction of the Honorable Court. Your petitioner further represents and insists that the said claim is invalid; and the said decision of the said Commissioners is

erroneous, and ought to be reviewed, reversed and set aside, for many errors and imperfections of the law and evidence, apparent in said certified transcript of the proceedings and decisions of said
64 commissioners in said cause, filed and appealed from as aforesaid. And your petitioner denies all and singular, each and every allegation in the said petition of said claimant presented as aforesaid to said Commissioners. And you petitioner further denies that the said claimant has any valid right or title to said land claimed as aforesaid, or any part thereof.

And no sufficient proof having been made of the allegations in said petition to said Commissioners, or in support of the said claim, no decision confirming the same should have been made by said Commissioners; but the said claim should have been rejected by them. And the said claimant, having no valid right or title derived from the Spanish or Mexican Governments, to the land claimed as aforesaid, the lawful right and title in and to the said land was acquired by, and it now belongs to the United States, by virtue of conquest, and the Treaty of Peace, friendship, limits and settlement between the United States and the Republic of Mexico, made at the City of Guadalupe Hidalgo, February 2nd, A. D. 1848.

Wherefore, the said Pacificus Ord, Attorney of the United States for the Southern District of California, for and in behalf of the United States, by reason of the premises, and in pursuance
65 of the Act of Congress, entitled "An Act to ascertain and settle the Private Land "Claims in the State of California," approved March 3rd, A. D., 1851, and the laws and statutes in such cases made and provided, prays that the said claimant, or its attorneys may be served with a copy of this petition; and that this Honorable Court will review the said decision of said Commissioners, and reverse the same; and decide on the validity of the said claim and decree the alleged title to be invalid: With costs and general relief.

P. ORD,
Attorney of the United States for the Southern District of California."

[Endorsed:] "Filed this 5th, Jan. A. D., 1857. C. Sims, Clk. pr. I. H. Coleman, Dep."

Notice of Appeal by United States from Decree of Confirmation.

"Office of the Attorney General of the United States.

WASHINGTON, 18 *March*, 1856.

714. "Pueblo Lands."

City of Monterey, Claimant:

You will please take notice that in the above case, decided
66 by the Commissioners to ascertain and settle private land claims in the State of California in favor of the claimant,

and a transcript of the proceedings in which was received in this office of the 1st day of March, 1856, the appeal in the district of the United States for the Southern district of California will be prosecuted by the United States.

C. CUSHING,
Attorney General."

[Endorsed:] "Filed April 30th, 1856. C. E. Car, Clk., By O. Morgan, Deputy."

"In the District Court of the United States in and for the Northern District of California.

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of the Notice of Appeal and Petition of Review in the cause entitled, The United States *vs.* City of Monterey, "Pueblo Lands," Docket No. 382, Transcript No. 714, now on file and of record in my office.

Attest my hand and seal of said District Court, this 22d day of June, A. D., 1894.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*"

67 *Abandonment of Appeal from Decree of Confirmation.*

"District Court of the United States for the Southern District of California.

At a regular term of said Court begun and holden at the Court room in the City and County of Monterey, State of California, on Wednesday, the sixteenth day of June, A. D. 1858.

No. 382.

THE CITY OF MONTEREY, Appellee,
adv.
THE UNITED STATES, Appellants.

Now on this day come the parties aforesaid by their respective attorneys:

Whereupon, on motion of P. Ord, District Atty., of the United States, and on showing to the Court that it is not the intention of the U. S. Government to prosecute further the appeal in this cause, the letter of the U. S. Attorney General being shown to that effect, and the stipulation of the aforesaid parties that neither will prosecute any further appeal in this action, being filed; it is ordered by the Court that the appeal in the cause be, and the same is hereby
68 dismissed and vacated, and it is decreed that said appellee, the claimant do have leave to proceed under the decree of the

Board of U. S. Land Commissioners heretofore rendered in this cause, as a final decree of confirmation."

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct copy of an Order as the same appears in the minutes of the U. S. District Court for the Southern District of California, in the cause of the City of Monterey, Appellee, *adv.* The United States, Appellants, No. 382, now on file and of record in my office.

Attest, my hand and seal of said District Court, this 19th day of June, A. D. 1894.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*"

[Endorsed:] "Plaintiff's Exhibit 2."

Plaintiff thereupon offered and read in evidence the patent of the United States to the City of Monterey, bearing date the 19th day of November, 1891, which is as follows, omitting the description, field notes and map of the land patented:

69 United States Patent.

"The United States of America to all to whom these presents shall come, Greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the Act of Congress, approved the third day of March, Anno Domini, one thousand eight hundred and fifty-one, entitled "An Act to ascertain and settle the private land claims in the State of California," *The Corporate Authorities of the City of Monterey,* as claimants, filed their petition on the second day of March, Anno Domini, one thousand eight hundred and fifty-three, with the Commissioners to ascertain and settle the private land claims in the State of California, sitting as a Board at the City of San Francisco, in which petition they claimed the confirmation of their title to a certain tract of land bounded and described as follows: "Commencing at the Mouth of the Monterey River (now called the Salinas) in the sea, and running from thence to the place well known as the Pilarcitos; thence running along a well known hollow or canada to the Laguna Seca, a place well known on the high road, to the Presidio of Monterey, thence running along the highest ridge of the
70 Mountains toward the Mission of San Carlos to the North side of a well-known point called Point Cipres, and from the said Point Cipres following all the course of the sea, to the place of beginning at the mouth of the said river of Monterey or Salinas."

And whereas the Board of Land Commissioners aforesaid on the twenty second day of January, Anno Domini, one thousand eight hundred and fifty-six, in the case entitled "The City of Monterey *vs.* The United States," rendered its decree as follows, to-wit: "In this case on hearing the proofs and allegations, it is adjudged by the Com-

mission that the claim of the said petitioners is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in the County of Monterey, and is bounded and described as follows, to-wit: From the mouth of the River of Monterey, in the sea to the Pilarcitos; thence running all along the Canada to the Laguna Seca, which is in the high road to the Presidio; thence running along the highest ridge of the Mountains of San Carlos, unto Point Cypress further to the North; and from said Point following all the Coast unto the said mouth of the River of Monterey; excepting and reserving
71 therefrom such portions thereof as are held by individuals owners by right or title derived from competent authority other than said pueblo or city;" which decree or decision having been taken on appeal to the District Court of the United States for the Southern District of California, and it having been shown that it was not the intention of the United States Government to prosecute further the appeal, said Court on the first day of February, Anno Domini, one thousand eight hundred and fifty-eight, in the cause entitled "The City of Monterey, appellee, *adv.* The United States, Appellant," made the following order: "It is ordered by the Court that the appeal in this cause be and the same is hereby dismissed and vacated; and it is decreed that said appellee the claimant do have leave to proceed under the decree of the Board of U. S. Land Commissioners heretofore rendered in this cause as a final decree of confirmation," whereby the proceedings of Court upon *title* became final.

And whereas under the thirteenth section of the Act of Congress of the third of March Anno Domini, one thousand eight hundred and fifty-one, and the supplemental legislation, and in accordance with the proceedings had pursuant to said Act, and supplemental legislation, there has been deposited in the General Land office of
72 the United States, a return with the descriptive notes, certificate of advertisement and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the United States Surveyor General for the State of California, and his official Seal, which descriptive notes, certificate of advertisement and plat of survey, a tracing of which is hereunto annexed and made a part thereof, are in the words and figures as follows, to-wit:

"U. S. Surveyor General's Office,

"San Francisco, Cal., *July 26th*, 1890.

"Under and by virtue of the provisions of the 13th section of the Act of Congress of the third of March, 1851, entitled, "An Act to ascertain and settle the private land claims in the State of California," and of the 12th section of the Act of Congress, approved on the 31st of August, 1852, entitled "An Act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes," and Whereas the U. S. District Court for the Southern District of California, rendered a decision whereby it recognized and confirmed the title and claim

of the City of Monterey to the tracts of land designated as the
73 Pueblo Lands of the City of Monterey, California, as appears from the certified copy of the final decree of the said District Court, a copy of which is hereto annexed, the said tracts of land were surveyed in conformity to the grant thereof, and the said decision, and I hereby certify that the accompanying compiled map is a true and accurate plat of the said tract of land as appears by the field notes of the surveys thereof, made under the direction of this office, which, having been examined and approved, remain of record therein.

The descriptive notes of said survey are in the words and figures following, to-wit:

(FIELD NOTES):

Tract No. One.....

Tract No. Two.....

Tract No. Three.....

Tract No. Four.....

Tracts Numbers One, Two, Three and Four containing in all, twenty-nine thousand, six hundred and ninety-eight, and fifty-three one-hundredths acres, and being designated upon the plats of public surveys as Lot Number Thirty-eight, Township Number Thirteen South, Range Number Two East; Lot number Thirty-eight,
74 Township Number Fourteen South, Range Number One East; Lots Numbers Thirty-nine and Forty, Township Number Fourteen South, Range Number Two East; Lots Numbers Forty and Forty-seven, Township Number Fifteen South, Range Number One East; Lot Number Thirty-nine of Township Number Fifteen South, Range Number Two East; Lots Numbers Forty-one, Forty-two, Forty-seven, Forty-eight and Fifty of Township Number Sixteen South, Range Number One East, Lot Number Forty of Township Number Sixteen South, Range Number Two East; Lot Number Thirty-eight of Township Number Fifteen South, Range One West; and Lot Number Forty of Township Number Sixteen South, Range Number Two West, all of Mount Diablo Base and Meridian.

In witness whereof, I have hereunto signed my name officially and caused my seal of office to be affixed in the City of San Francisco, this the twenty-sixth day of July, A. D., 1890.

[SEAL.] WM. H. PRATT,

U. S. Surveyor General, District of California."

75 "Office of the Surveyor General of the United States for California.

"Times."	*"Monterey Gazette."*
16, 9, '68.	24, 9, '68.
7, 10, '68.	15, 10, '68.

"I, Sherman Day, United States Surveyor General for the State of California, do hereby certify that the Rancho, *City Lands of Monterey*, confirmed to the Mayor and Common Council of Monterey, has been surveyed by this office, and that the survey and plat was approved by the United States Surveyor General, on the 5th day of January, 1869; that I have caused to be published, once a week for four successive weeks, in two newspapers, to-wit: The *Monterey Gazette*, published in the County of Monterey, State of California, being the newspaper published nearest to where the said Rancho is located, the first publication being on the 24th day of September, 1868; and the last on the 15th day of October, 1868; also in the *Times*, a newspaper published in the City and County of San Francisco, State aforesaid, the first publication being on the 16th day of September, 1868; and the last on the 7th day — October, 1868, a notice that the said land had been surveyed and a plat made
76 thereof, and the survey and plat approved by me. And I do further certify that the said survey and plat were retained in my office during all of said four weeks, and until the expiration thereof, subject to inspection, and I further certify, that no order for the return thereof to the U. S. District Court has been served upon me.

In testimony whereof, I have hereunto signed my name officially, and caused my seal of office to be affixed, at the City of San Francisco, this day of , 186 .

SHERMAN DAY,
U. S. Surveyor General for California."

"DEPARTMENT OF THE INTERIOR,
OFFICE OF THE U. S. SURVEYOR GEN.
SAN FRANCISCO, CALA., *October 9th*, 1891.

"I, W. H. Pratt, U. S. Surveyor General for California, do hereby certify that the annexed and foregoing is a full, true and literal exemplification of certificate of publication in the matter of the survey of the City Lands of Monterey as shown by the records of this office.

(L. S.) WM. H. PRATT,
U. S. Surveyor General for California."

77 Now know ye, That the United States of America, in consideration of the premises and pursuant to the provisions of the Act of Congress aforesaid of third of March Anno Domini one thousand and eight hundred and fifty-one and the legislation supplemental thereto, *Has Given and Granted* and by these presents *Does Give and Grant* unto the said *The City of Monterey*, its successors and assigns, the tracts of land embraced and described in

the foregoing survey, but with the stipulation that in virtue of the fifteenth section of the said Act, neither the confirmation of this said claim, nor this patent shall affect the interest of third persons.

To Have and To Hold the said tract of land with the appurtenances unto the said *The City of Monterey,* its successors and assigns, forever, with the stipulation as aforesaid.

In Testimoney Whereof, I, Benjamin Harrison, President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this nineteenth day of November, in the year of our Lord, one thousand eight hundred and nine-one, and of the Independence of the United
78 States, the one hundred and sixteenth.

By the President,

[SEAL.] BENJAMIN HARRISON.

By E. MACFARLAND,
Asst. Secretary.

I. R. Conwell, Recorder of the General Land office, ad interim. Recorded, Vol. 13, pp. 17 to 58 inclusive."

It was thereupon admitted by counsel for the respective parties that the premises described in the complaint in this action are included within the description in said patent of the lands there granted.

S. J. DUCKWORTH was thereupon called as a witness for plaintiff, and being duly sworn, testified as follows:

"I am the Clerk of the City of Monterey, and have been such clerk since 1892. I am familiar with that town and the localities around it. I have lived there off and on all my lifetime. There is on file in the archives of my office a map purporting to have been made in the year 1849 of the old town of Monterey. (Witness here produces said map, which was exhibited in evidence by plaintiff.) That
79 map, so far as I can see from inspection, intelligently defines the tract of land which it purports to define."

(There was here exhibited to the witness the map of the present City of Monterey on file in the office of the Recorder of said Monterey County.)

(Witness continuing:) "All the buildings and edifices shown on that map of the old town of Monterey are within the limits of the present City of Monterey as shown on the second map. Taking the church shown as the Mission Church on the old map, and as the Catholic Church on the present map, as a center, a line running in an easterly direction a mile from that church would be just about the present city limits. A line running a mile in a southerly direction from that church would come a little outside of the limits of the old map. To the north the present city limits are about a mile and a half or a mile and three quarters from that church. The northerly

boundary is the same on both maps. A line running westerly from that church for a mile would come to about the present city limits. There is a general correspondence between the two sets of boundaries."

It was thereupon admitted by counsel for both parties that the present City of Monterey, the plaintiff herein, was incor-
80 porated in the year 1889 under the general laws of this State concerning the incorporation of municipal corporations."

Plaintiff thereupon rested.

J. D. KALAR was thereupon called as a witness for defendant, and being duly sworn testified as follows:

"I am County Clerk of the County of Monterey, and have been such since May, 1897. I have made an examination among the files of my office for the purpose of ascertaining whether I could find therein any returns of elections, oaths of office, or official bonds of any officer of any character, within the County of Monterey prior to the year 1870, but there are no such papers in the office, and I have never known of any such papers there. I have no knowledge of where they are. I find no record of any such papers in my office. That applies to all county officers as well as to municipal officers. The Court House was destroyed by fire, but I don't know just when."

W. M. R. PARKER was thereupon called as a witness for the defendant, and after being duly sworn, testified as follows:

81 "I have been a resident of the County of Monterey for over thirty-two years and have been familiar with the Clerk's office during part of that time. I went in as incumbent of the office in November, 1862. There was a fire in the Clerk's office in 1877. I don't know what records were destroyed. There were no books destroyed that I know of. When I went in office in 1862 the office was upstairs in Colton Hall in Monterey; it was moved to the lower floor in 1869 and in the winter of 1872 it was moved out here; after the fire it was moved again and then it was moved into this building; the fire entirely burned the Court House; there were papers burned, but I do not know what they were. When we moved from Monterey into that building there was a vault built to keep the record books in. The Clerk and Recorder were together at that time.

Q. Do you know whether any of the papers were burned or not?

Ans. I was not in the office at that time and I don't know.

After that the Recorder was made a separate office and he took his books out, but there was not enough room in the vault to hold all these papers and they were outside in the wooden building, and when the building was burned it is natural to suppose some of them
82 went with it. I do not know whether they did or not."

EDWIN L. WILLIAMS was thereupon called as a witness for defendant, and being duly sworn, testified as follows:

"I was Town Clerk of the City of Monterey during the year 1850, and, as such, kept the records of the municipality at that time. I

have seen this book marked on the outside "Records of the City Council and the Trustees—A." I first saw it in January, 1850. The entries in that book from January 16th, 1850, are in my handwriting. I know something of the adoption or use in or about that year of a seal for the City of Monterey. On page 50 of that minute book I find the following under date of the 10th day of April, 1850:

"On motion by Alderman Kane that the following description be adopted as the arms and City seal of Monterey: Escutcheon—Field vert, and divided by a sinister bar, anchor and sheaf proper; supporters—horse, dexter, rampant, bull, sinister rampant; crest—rising sun, in or; motto—"Anda," which was unanimously carried."

On page 51 of that minute book I find another resolution under date of April 15th, 1850, referring to the seal as follows:

83 "On motion, the sixth rule of order was suspended for the purpose of passing the following ordinance: 'Be it ordained by the Mayor, Recorder and Common Councilmen of the City of Monterey in Council assembled, that the Mayor of the City be and he is hereby authorized and empowered to affix the Common Seal of the City unto, and to sign, seal, execute and deliver in behalf of the City, all deeds and leases of land sold or leased by the City, and of all deeds, agreements, indentures or assurances made and entered into by order of the City Council. Carried unanimously.'

(Witness continuing:) As long as I was City Clerk, I have no recollection of the seal having been used; there was no occasion for it. A seal was obtained. (The witness here produces a seal.) This is the original seal which I had in my possession as Town Clerk of Monterey in the year 1850. This is an impression from that seal.

DEFENDANT'S EXHIBIT "A."

[SEAL OF THE TOWN OF MONTEREY.]

(Witness continuing:) For six years from the year 1854, I was either Deputy or principal County Clerk. During that time I knew John Burke Phillips, J. D. Callaghan and Salvador Osio.

84 Q. Do you know who, in the year 1859, and prior to February 9th, were acting and commonly reputed to be the Trustees of the Town of Monterey?

Plaintiff objected to said question as immaterial and incompetent; that the existence of these officers, at least for the purpose of this case, cannot be proved by parol; that the record is the best evidence, and that the record has neither been produced nor its absence accounted for. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. John Burke Phillips, J. D. Callaghan and Salvador Osio were then he commonly reputed town trustees. I never had any business with them officially, and consequently can't say that I ever saw them act as such trustees. I saw some of their acts so signed.

Cross-examination:

I recognize the impression of that seal from memory; not the apparatus. This is not the identical press that was in the office at that time; there was none; there was simply a round piece of brass, and the intention was to make an impression on sealing-wax, but it was never in fact used during my term of office.

85 I never was present at any meeting of the Board of Trustees, at which the persons I have named acted as Trustees. I saw some of the acts of those reputed Trustees signed by them.

Q. In what book or what paper did you see them so signed?

A. I saw in the Town of Monterey posted on a prominent corner, an advertisement by them of the sale of these very lands, signed by their hands.

Q. Any other official act that you know of their performing?

A. I saw the deed purporting to be to Mr. Jacks for the land in controversy in this case, which they signed.

Q. Have you ever known of their performing any other official acts?

A. That is all that I now remember."

JOHN D. PORTER was thereupon called as a witness for defendant, and being duly sworn, testified as follows:

"I was sheriff of Santa Cruz County in '57, '58, '59 and '60. About those times I visited the City of Monterey. I knew John Burke Phillips, John D. Callaghan and Salvador Osio.

86 Q. Do you know who, on the 9th day of February, 1859, and prior thereto, during all of the year 1859, were commonly reputed to be the Trustees of the City of Monterey?

A. I do.

Q. Who were they?

To which question plaintiff objected on the ground that the same is incompetent, and that the official positions of those gentlemen cannot be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. John Burke Phillips, Salvador Osio and J. D. Callaghan. I was not present at any of the acts done by them, and do not individually know of any official acts performed by either of them as such Trustees."

J. S. FINCH was thereupon called as a witness for defendants, and being duly sworn, testified as follows:

"In 1858 and 1859 I lived in Monterey. I then knew John Burke Phillips, J. D. Callaghan and Salvador Osio. I was keeping hotel at Monterey at that time. I know who in 1858 and 1859 were commonly reputed and known to be the Trustees of the Town of Monterey.

Q. Who were?

87 To which question plaintiff objected on the same grounds, which objection was overruled by the Court, and to which ruling plaintiff then and there duly excepted.

A. John Burke Phillips, J. D. Callaghan and Salvador Osio. I know of their meeting as such Trustees. They held their meetings in a room right across the way from me, and I used to see them go there and come away. I never had any business with them, but I was on the other side of the street, and they used to come across there very often. I kept a bar and they would come in there and take drinks, and during the time they were in there they would be talking while I was waiting on them.

Cross-examination:

I never attended any meeting of the Trustees at which either of these gentlemen was present."

GEORGE AUSTIN was thereupon called as a witness for defendant, and being duly sworn, testified as follows:

"I lived in Monterey in 1858 and 1859.

88 Q. Do you know who, in 1858 and 1859, up to and including February 11th, were commonly reputed to be the Trustees of the City of Monterey?

A. Yes.

Q. Who were?

To which question plaintiff objected on the ground that the same is incompetent, and that the official positions of those gentlemen cannot be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. J. D. Callaghan, Salvador Osio and John Burke Phillips. I remember an election in that city in which those gentlemen were considered as candidates for Trustees.

Q. Who, after that election, were reputed to be and acting as Trustees of the City of Monterey?

To which question plaintiff objected on the ground that the same is incompetent, and that the official positions of those gentlemen cannot be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. J. D. Callaghan, Salvador Osio and Phillips.

Q. After the election in which you speak of these men being candidates, who after that were reputed to be and commonly known to be the Trustees of the City of Monterey?

89 To which question plaintiff objected, on the ground that the same is incompetent, and that the official positions of those gentlemen can not be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. The same three, Callaghan, Osio and Phillips.

Cross-examination:

I know they used to hold meetings in Mr. Callaghan's office, but their real business, when they held these meetings, I don't know; I never attended any of those meetings.

M. C. IRELAND was thereupon called as a witness for defendant, and being duly sworn, testified as follows:

"In 1858 and 1859 I lived at Carmel, about four miles from Monterey. During those years I was at Monterey most every week.

Q. Who, on the 9th day of February, 1859, and before that, during all the year 1858, were commonly reputed in Monterey to be the Trustees of the City of Monterey?

To which question plaintiff objected, on the ground that the same is incompetent, and that the official positions of those gentle-
90 men can not be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. John Burke Phillips, Salvador Osio and J. D. Callaghan.

Cross-examination:

Q. What did they do as Trustees?

A. I was standing in front of their office—they had an office in front of Callaghan's drugstore—and I was standing there frequently.

Q. Did you ever attend their meetings?

A. No, I had no interest in their meetings. I just saw them there frequently."

DAVID JACKS, the defendant, was thereupon called as a witness on his own behalf, and being duly sworn, testified as follows:

"I have lived in the City of Monterey since 1849.

Q. Do you know who, in that city, during the year 1858 and in the year 1859, to and including the 9th day of February, were commonly reputed to be the Trustees of the City of Monterey?

A. I do.

Q. Who were they?

To which question plaintiff objected on the ground that the
91 same is incompetent, and that the official positions of those gentlemen can not be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. John Burke Phillips, was known as the President of the Board of Trustees, John D. Callaghan was known as the Clerk of the Board of Trustees, and Salvador Osio was known as the Treasurer of the Board of Trustees. Callaghan is the only one of them now living, and he is a partial imbecile and incapable of testifying. I remember an election of Town Trustees in the City of Monterey at which the gentlemen of whom I have spoken were candidates.

Q. Do you remember who, from and after that election, for some

years afterwards, were reputed to be and acted as Trustees of the City of Monterey?

To which question plaintiff objected on the ground that the same is incompetent, and that the official positions of those gentlemen can not be proved by common reputation. Said objection was overruled by the Court, to which ruling plaintiff then and there duly *accepted.*

A. John Burke Phillips was President of the Board, and John D. Callaghan was Clerk of the Board of Trustees, and Salvador Osio was Treasurer of the Board of Trustees.

92 Q. What acts have you seen them perform, purporting to act in that capacity?

A. I was out and in the office at different times when they were having those meetings in regard to the sale of these lands, and heard them talking about it—discussing it—and heard them come to a conclusion about it. Their meetings were held at Dr. Callaghan's office, which was on the public street in Monterey, in the business part of the City. I first saw that paper now shown me, which purports to be a conveyance to myself and Mr. Ashley, dated the 9th day of February, 1859, on the date it was purported to have been made out. I saw it on the table in front of those gentlemen, when they were signing it, at that office. I know the signatures affixed to that paper. They are the signatures of John Burke Phillips, President of the Board, Salvador Osio, as Treasurer of the Board, and John D. Callaghan, Clerk of the Board. I can't say whether I saw that red seal on the deed or not. I saw them making out the deed at that time. The deed has been in my possessin for many years. Since it has been in my possession it has had the same red seal on it.

93 It was agreed that Mr. Ashley and myself should be there with $500 each when they were making out that deed.

Q. Did you owe them any money; what did they want this money for?

To which question plaintiff objected on the ground that the same is irrelevant and immaterial. Said objection was overruled by the Court, to which ruling plaintiff then and there duly excepted.

A. We were going to get a deed from the City of Monterey. The lands had been put up and sold at public auction, and Mr. Ashley had bid that amount for the property. Mr. Ashley and I paid the money to Dr. Callaghan, and he turned it over to the Treasurer."

Defendant thereupon offered in evidence in connection with the testimony of the witness, a deed dated February 9th, 1869, purporting to have been filed for record in the office of the County Recorder of Monterey County on the 11th day of June, 1859, and to have been recorded in Book "D" of Conveyances, at page 222 and following. The following is a copy of said deed, with the certificates and endorsements thereon:

"This Instrument of Conveyance made this ninth day of February, A. D., 1859, between the City of Monterey, in the State

94 of California, by and through the Trustees of said City, to-wit: John Burke Phillips as President, Salvador Osio as Treasurer,

and John D. Callaghan as Clerk, and the said Trustees of said City in their official capacity and there to duly authorized by virtue of their office as said Trustees, party of the first part; and D. R. Ashley and David Jacks both of Monterey, California, parties of the of the second part,—

Witnesseth:—That whereas said party of the first part and said City of Monterey was indebted to D. R. Ashley in the sum of nine hundred and ninety-one and one-half dollars for expenses of prosecuting the title to lands of the said City before the Board of United States Land Commissioners and before the United States Courts, and so has been indebted up to the making the sale hereinafter mentioned, and there being no money in the treasury of said City or belonging to said City to pay the said indebtedness of the same to said D. R. Ashley, and therefore under order and ordinance of said Board of Trustees, after due notice for two weeks given by publication of the same in the newspaper called the *Pacific Sentinel* and by posting up notices of the sale in the English and in the Spanish language-

in at least three of the most public places in said City of Mon-
95 terey, there was, on this 9th day February, A. D. 1859, sold to said parties of the second part, for the purpose of paying the indebtedness aforesaid of said City, the lands and premises in this Conveyance hereinafter described and set forth; and this sale to said parties of the second part having been made at public auction at the hour of twelve o'clock M. of this day at the front door of the County Court House in the City of Monterey to the highest bidder for cash, and said hereinafter described lands were struck off and sold to said parties of the second part for the sum of one thousand two and one half dollars, being the amount of the aforesaid indebtedness and the necessary expenses of sale; said parties of the second part being the highest and best bidders, and said sum being the highest sum bid at said sale and no person or bidder was willing or offered to take and buy less than all the lands and premises hereinafter described, and said sum so bid is not more than is absolutely necessary to pay the said indebtedness of said City and the expenses of sale, and said sum so bid was then and there paid by said parties of the second part; now therefore in consideration of the premises and in consideration of said sum of one thousand two and one-half dollars lawful money of

the United States of America by said parties of the second part
96 paid to said party of the first part and the receipt whereof is hereby acknowledged, said party of the first part has granted, bargained, and sold and by these presents does grant, bargain, and sell, quit-claim and convey unto said parties of the second part and their heirs and assigns in fee simple absolute all the lands situate, and being in the State of California and County of Monterey and described as follows, to-wit: the lands belonging to the City of Monterey, granted by the Mexican Government to, or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the United States Land Commissioners for California to said City; including and comprising all the right, title and interest which said City has or may have, whether in possession or in expectancy, in and to the lands, and every part and portion thereof,

bounded as follows: Commencing at the mouth of the Salinas or Monterey River and running up that stream to the site of Pilarcitos; thence through the cañon to the Laguna Seca; thence following the summit of the hills and the City line between Monterey and Carmel to Point Cypress; and thence following the Pacific Ocean to the place of beginning and containing all the lands by the authorities of the United States confirmed to said City of Monterey; together
97 with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise pertaining with the rents, issues and profits thereof.

To have and to hold unto said parties of the second part, their heirs and assigns, all the lots, portions, parcels and pieces of land aforesaid and all the appurtenances thereto, lying and being situated within the bounds aforesaid.

In witness whereof the Trustees of said City execute this instrument of Conveyance the day and year first above written.

N. B.—The words "one thousand two" were erased and the words "nine hundred and ninety-one were interlined in lieu thereof before the execution of this conveyance.

JOHN BURKE PHILLIPS, *President.* [SEAL.]
SALVADOR OSIO, *Treasurer.* [SEAL.]
JOHN D. CALLAGHAN, *Clerk.* [SEAL.]

Signed, sealed and delivered in presence of
CHAS. B. FINCH.
[SEAL.] E. R. CLAY.

98 STATE OF CALIFORNIA, *County of Monterey, ss:*

On this 12th day of February, A. D. 1859, before me, Charles G. Harrow, a Justice of the Peace in and for said County of Monterey, personally appeared John Burke Phillips, Salvador Osio and John D. Callaghan, Trustees of the City of Monterey, and each of them to me personally known to be the person described in and who as Trustee of said City executed the foregoing instrument of Conveyance, and they each severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein expressed, as Trustees of said City.

Witness my hand.

CHAS. G. HARROW,
Justice of the Peace, Monterey Township.

STATE OF CALIFORNIA, *County of Monterey, ss:*

I, James H. Gleason, County Clerk of said County and Clerk of the County Court of said County, do hereby certify that Charles G. Harrow is a duly elected and qualified Justice of the Peace in and for said County and is acting as such, and that his signature to the foregoing Certificate of acknowledgment is his true and gen-
99 uine signature, and that full faith and credit is due to his acts as such Justice of the Peace.

[SEAL.] Given under my hand and seal of the County Court affixed hereunto this fourteenth day of February, A. D., 1859.

JAS. H. GLEASON,
County Clerk Monterey County."

[Endorsed:] "Conveyance:—The City of Monterey to D. R. Ashley and David Jacks. Received for record, June 11th, 1859, at 3 o'clock P. M., and recorded in Book D of Conveyances on page 222 and following. Jas. H. Gleason, Recorder, Monterey County, by Edwd. L. Williams, Deputy."

Plaintiff objected to the admission in evidence of said deed, on the ground that no authority had been proved from the City of Monterey for the execution of the same; and specifically, that it had not been proven that any of the persons whose names purport to be signed thereto were officers of the City of Monterey; that it had not been proven that the red substance affixed to that deed was an impression of the seal of the City of Monterey; that no minute or resolution of the Board of Trustees of said City authorizing or
100 directing the execution of such conveyance had been produced, and that said Board of Trustees had no legal authority to make or authorize such a conveyance.

Said objection was overruled by the Court, and said instrument introduced and read in evidence, to all of which the plaintiff then and there duly excepted.

(Witness continuing:) "The papers now shown me I received from John D. Callaghan, the Clerk of the Board of Trustees in Monterey. When I received them that red seal was there."

Defendant- thereupon offered the paper so identified by the witness, in evidence, and the following is a copy thereof:

DEFENDANTS' EXHIBIT "B."

Auction Sale.

On the ninth day of February, A. D., 1859, between the hours of 9 o'clock A. M. and five o'clock P. M., at the County Court House door in the City of Monterey, there will be sold for cash at public auction to the highest bidder, to pay certain indebtedness now outstanding against the City of Monterey the following described property, or so much thereof as may be necessary to pay the same. To-wit: The lands belonging to the City of Monterey, situated in the County of Monterey, granted by the Mexican Government,
101 or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the U. S. Land Commissioners for California, to said City, including and comprising all right, title and interest which said City has or may have, in possession or expectancy in, and to the lands and every part and portion

thereof bounded as follows: Commencing at the Mouth of the Salinas or Monterey River, and running up that stream to the site of the "Pilarcitos," thence through the Cañon to the "Laguno Seco," thence following the summit of the hills and the City line between Monterey and Carmel to Point Cypress; thence following the Pacific Ocean to the place of beginning.

By order of the Board of Trustees of the City of Monterey.

J. D. CALLAGHAN,
Clerk of said Board.

Dated City of Monterey, January 25th, A. D. 1859.

Indorsement on the Above Notice.

Notice of sale of City Lands, Sold to D. R. Ashley and David Jacks on the 9th day of Feb. A. D. 1859.

102 Received of D. R. Ashley and David Jacks, the sum of one thousand two and one-half dollars, which amount I have turned over to S. Osio, Treasurer of Board of Trustees.

J. D. CALLAGHAN,
Clerk of Board of Trustees and Auctioneer.

To the Honorable Board of Trustees of the City of Monterey:

The undersigned hereby reports as follows: That in pursuance of an order heretofore made by the Board of Trustees directing and authorizing him to sell all the right, title and interest, &c., of the City of Monterey, in and to the City lands or so much thereof as would be necessary to pay certain indebtedness,—that after giving the notice of such sale as directed by said Board (copies of which are herewith filed) he did on the 9th day of February A. D. 1859, between the hours of 9 o'clock A. M. and five o'clock P. M., in front of the County Court House door, in the City of Monterey, offer for sale and sold for cash to D. R. Ashley and David Jacks, they being the highest bidders, and no other person or persons present offering to take less, for the sum of one thousand and two and 50-100 dollars, all the right, title and interest of the City of Monterey, in and to the lands lying within the boundaries of said City.

J. D. CALLAGHAN,
Clerk of Board of Trustees.

103 CITY OF MONTEREY, *February 9th, A. D.* 1859.

Indorsements on within report: "Auctioneers' Report of City Lands Sale to Board of Trustees. Filed, Feb'y 9th, 1859. J. D. Callaghan, Clerk of the Board of Trustees."

SANTA CRUZ, *Feb. 14th*, 1859.

Board of Trustees of the City of Monterey, To *Pacific Sentinel*, Dr.
Jan'y 25th, 1859, to advertising Sale of Pueblo lands, 4 squers 2 times with afft.....$12.50

STATE OF CALIFORNIA, *County of Santa Cruz, ss:*

John McElroy, editor of the Pacific Sentinel, a newspaper published at Santa Cruz, California, being sworn, says that the notice of sale of which the annexed is a true copy was published weekly in said newspapers, for two weeks commencing January 29th, A. D. 1859.

J. McELROY.

Subscribed and sworn to before me, at Santa Cruz, this 14th day of February, A. D. 1859.

A. McPHERSON,
Justice of the Peace of Santa Cruz Township.

104 *Auction Sale.*

On the Ninth day of February, A. D. 1859, between the hours of 9 o'clock A. M. and 5 o'clock P. M., at the County Court House door, in the City of Monterey, there will be sold for Cash, at public auction to the highest bidder, to pay certain indebtedness now outstanding against the City of Monterey, the following described property, or so much thereof as may be necessary to pay the same, to-wit—the lands belonging to the City of Monterey, situated in the County of Monterey, granted by the Mexican Government to or set apart by the former authorities of California, for the Pueblo of Monterey, and confirmed by the United States Land Commissioners for California to said City including and comprising all the right, title and interest which said City has or may have in possession or expectancy in, and to the lands and every part and portion thereof, bounded as follows: Commencing at the mouth of the Salinas or Monterey River, and running up that stream to the site of the Pilarcitos, thence through the canon to the Laguna Seca, thence following the summit of the hills and the City line between Monterey and Carmel to Point Cypress, thence following the Pacific Ocean to the place of beginning.

105 By Order of the Board of Trustees of the City of Monterey.

J. D. CALLAGHAN,
Clerk of Said Board.

Dated, City of Monterey, January 25, 1859.

(Indorsements:) Notice of Sale, Pueblo Lands. Filed February 19th, A. D., 1859. J. D. Callaghan, Clerk of the Board of Trustees, Monterey, Cal.

STATE OF CALIFORNIA, *City and County of Monterey.*

I, J. D. Callaghan, Clerk and member of the Board of Trustees of the City of Monterey in said State, do hereby (certify) that the foregoing five pages is a full, true and correct copy of an original

document on file in my official charge and custody as such Clerk, I being the lawful custodian of the same.

[SEAL.]

Witness my hand and the seal of said City affixed, this 18th day of May, A. D., 1861.

J. D. CALLAGHAN,
Clerk, Board of Trustees of the City of Monterey."

Plaintiff objected to the admission in evidence of said documents and each of them, on the ground that it had not been proven
106 that the person signing said certificate was the Clerk of the Board of Trustees of the City of Monterey, nor that the seal thereto affixed was the seal of said City, nor that the officers whose names purport to have been there signed were officers of the City of Monterey, or had any authority from the Board of Trustees of that City, or any legal authority whatever to take any of the proceedings mentioned in said papers.

Said objection was overruled by the Court, and said papers were introduced and read in evidence, to all of which plaintiff then and there duly excepted.

(Witness continuing:) The paper now shown me I received very soon after the 18th day of May, 1861, from John D. Callaghan, the Clerk of the Board of Trustees of the City of Monterey.

Defendant thereupon offered in evidence the paper so identified by the witness, and the following is a copy of the same:

DEFENDANTS' EXHIBIT "C."

"Monday, January 24th, 1859.—A meeting of the Board of Trustees for the City of Monterey, held at J. D. Callaghan's office, in said City. Present, John Burke Phillips, President; Salvador
107 Osio, Treasurer and J. D. Callaghan, Clerk. When appears D. R. Ashley, and presents his claim for Seven Hundred and Fifty Dollars for services as Attorney in prosecuting to successful sisue, before the U. S. Land Commissioner the claim of the City of Monterey, to the Pueblo Lands, said claim being now filed.

The Board now proceeds to examine the same and finds that said services have been performed by D. R. Ashley, and finds that said claim has been certified to be correct, and due said Ashley from the City of Monterey, by a former Board of Trustees, to-wit: Josiah Merritt, President and James H. Gleason, Treasurer, as appears by their Certificate, under their hands, as said Trustees, attached to said account, dated 19th day of August, 1856. And it appearing further to said Trustees, that said claim became due on the 22nd day of January, 1856, from which date it bears legal interest at ten per cent. per annum.

The Board now adjourns to 11 o'clock tomorrow.

J. D. CALLAGHAN, *Clerk.*
JOHN BURKE PHILLIPS, *President.*

Tuesday, January 25th, 1859.—In pursuance of adjournment the Board met at 11 o'clock A. M. Present, John Burke Phillips,
108 President; Salvador Osio, Treasurer and John Callaghan, Clerk. Now appears D. R. Ashley before the Board, and presents an account for thirteen ($13) dollars and receipt for the same, from the Clerk of the Southern U. S. District Court, for the Southern District of California, for costs for papers from said Court in relation to the City Land Title. It appears to the Board that said account is correct and just, and is allowed.

"The Board finds that both accounts or claims of D. R. Ashley, principal and interest, on the 9th day of February proximo, will amount to Nine hundred and ninety-one 50-100 dollars ($991.51-100) for attorney's fees and expenses in prosecuting the title of the City lands, before the U. S. Land Commissioners, and the U. S. District Court, and the same is allowed and ordered to be paid. The Board finds that there is no funds in the hands of the Treasurer to pay said amount. It is therefore ordered, that to pay said amount with expenses of sale, that at the County Court House door, at the City of Monterey, on the 9th day of February next, between the hours of nine o'clock A. M. and five o'clock, P. M., there will be sold at public auction to the highest bidder to pay said amount, the following property, or so much thereof as may be necessary to pay the same,
109 to-wit: The lands belonging to the City of Monterey, situated in the County of Monterey, granted by the Mexican Government to or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the U. S. Land Commissioners, for California to said City; including and comprising all the right, title and interest which said City has or may have in possession or in expectancy in and to the lands and every part and portion thereof, bounded as follows: Commencing at the mouth of the Salinas or Monterey River, and running up that stream to the site of "Pilarcitos," thence through the Canada or Canon to the "Laguna Seco," thence following the summit of the hills and the City line between Monterey and Carmel to Point Cypress; thence following the Pacific Ocean to the place of beginning.

It is further ordered that notice of the time, place and manner of said sale be given by posting three notices, in English and Spanish, in three public places in the City of Monterey, for two weeks; and by publication by two insertions in English in the *Pacific Sentinel*, a newspaper published in Santa Cruz County—and further ordered that the Clerk of this Board be and is hereby directed to make said sale.

JOHN BURKE PHILLIPS, *President.*
J. D. CALLAGHAN,
Clerk of the Board of Trustees.

110 Wednesday, February 9th A.D. 1859.—A meeting of Board of Trustees held at J. D. Callaghan's office—Present, John Burke Phillips, President; Salvador Osio, Treasurer, and J. D. Callaghan, Clerk. Now the Clerk presents to the Board his report of the sale of the City Lands, heretofore ordered to be made by the

Board, the Board examines the report and adopts the same—it appearing to the satisfaction of the Board that the sum, to-wit: one thousand two and one half dollars, the amount of said sale, has been received by the Clerk and by him turned over to the Treasurer whereupon the Board doth execute to the purchasers, D. R. Ashley and David Jacks, a conveyance of said lands. Now the Clerk presents the Treasurer's receipt to the Board, for the amount of one thousand two and one half dollars, being the amount of said sale and the same is ordered filed by the Board. Also the Treasurer presents D. R. Ashley's receipt for the amount of nine hundred and ninety-one 50-100 dollars, being the amount of his bill against the City, as heretofore allowed, and the same is ordered to be filed by the Board, and also the Treasurer presents a receipt from the *Pacific Sentinel* for the amount of eleven dollars, being the costs of publishing notice, which is ordered to be filed.

111 The Board now adjourns.

JOHN BURKE PHILLIPS, *President.*
J. D. CALLAGHAN, *Clerk.*

STATE OF CALIFORNIA, *City and County of Monterey.*

I, J. D. Callaghan, Clerk and member of the Board of Trustees of the City of Monterey, in said State, do hereby certify that foregoing five pages is a full, true and correct copy from the original Book of Record of proceedings of the Trustees and Ayuntamiento etc., of said City, in my official charge and custody as such Clerk, I being the lawful custodian of the same.

N. B. "Trustees and" interlined before execution hereof, witness my hand and the seal of said City affixed this 18th day of May A. D. 1861.

[SEAL.] J. D. CALLAGHAN,
Clerk, Board of Trustees of the City of Monterey."

Plaintiff objected to the admission in evidence of said paper on the ground that the person whose name is signed to the certificate
112 had not been proved to have been an officer of the City of Monterey, and on the further ground that the seal affixed thereto had not been proved to be the seal of the City of Monterey, and that there was no proof that said documents were copies of any official documents of that City. Said objection was overruled by the Court, and said paper was introduced and read in evidence, to all of which plaintiff then and there duly excepted.

(The witness continuing:) The paper now shown me I received from John D. Callaghan in the City of Monterey very soon after its date, and it was then in the same condition as now.

Defendant thereupon offered said paper in evidence, and the following is a copy of the same:

DEFENDANT'S EXHIBIT "D."

"D. R. Ashley, Esq., To C. Sims, U. S. Dis'ct Clk., Dr.

No. 382.

CITY OF MONTEREY
adv.
THE UNITED STATES.

For fees due Clk., Copying, etc., to date.....$13.00
Received payment,

C. SIMS,
Pr. J. H. COLEMAN

113 LOS ANGELES, *5th March*, 1858.

The City of Monterey to D. R. Ashley.

For cash paid as above shown.....$13.00

(Indorsements:) City of Monterey per D. R. Ashley.
To Clerk $13.00
Filed 25th January, 1859.

J. D. CALLAGHAN, *Clerk.*

Received, Monterey, February 9th, 1859, of J. D. Callaghan, Clerk of Board of Trustees, one thousand and two and one half dollars. $1002.50-100.

SALVADOR OSIO,
Treasurer of Board of City Trustees of the City of Monterey.

(Indorsements on above receipts.)

Treasurer's receipts to Clerk for.....$1002.50
Filed February 9th A. D. 1859.

J. D. CALLAGHAN,
Clerk, Board of City Trustees.

Rec'd of Salvador Osio as Treasurer of the City of Monterey, the sum of Nine hundred and ninety-one and one half dollars
114 being the sum in which said City is indebted to me for prosecuting the title to lands of said City before the United States Land Commissioners and the U. S. District Court.
February 9th, 1859.

D. R. ASHLEY.

(Indorsements on the above receipt:) D. R. Ashley's receipt to Treasurer for $991.50. Filed Feb. 9th, A. D. 1850. J. D. Callaghan, Clerk, Biard of City Trustees.

The City of Monterey to the *Pacific Sentinel*, Dr.

For publishing notice of sale of lands of said city on the 9th of February 1859, inserted for two weeks. ($11.00.)

Received payment,

J. McELROY, *Publisher*,
By D. R. ASHLEY.

(Indorsements on the above receipt:) *Pacific Sentinel* Receipt to Treasurer for $11.00. Filed Feby. 9th, A. D. 1859. J. D. Callaghan, Clerk, Board of City Trustees.

115 STATE OF CALIFORNIA, *City and County of Monterey, ss:*

"I, J. D. Callaghan, Clerk and member of the Board of Trustees of the City of Monterey in said State, do hereby certify that the foregoing four pages is a full, true and correct copy of the original documents on file in my official charge and custody as such Clerk, I being the lawful custodian of the same.

Witness my hand and the seal of said City affixed this 18th day of May, A. D. 1861.

[SEAL.] J. D. CALLAGHAN,
Clerk, Board of Trustees of the City of Montery."

Plaintiff objected to the admission in evidence of said document on the same grounds as in the objection to the last paper before offered. Said objection was overruled by the Court, and the said document was introduced and read in evidence, to all of which plaintiff then and there duly excepted.

(Witness continuing:) "I have been in possession of those lands from the time of that sale down to the commencement of this action. I have paid the taxes on this land from 1877 down to the present time."

The assessment rolls of the County of Monterey were then
116 introduced in evidence and showed that the lands in controversey were, from the year 1877 down to 1893, assessed to David Jacks.

Cross-examination:

I did not take possession of about 2000 acres of this land which was granted by Colton as Alcade of Monterey. I can not give a description of that 2000 acres without going over the records. The money that Mr. Ashley and I paid was afterwards given by John Callaghan to the Treasurer. Then after it was all through, it was paid over to Mr. Ashley, and his receipt taken for it, right then at the same time. It was passed back to Mr. Ashley at the end of the transaction."

W. E. PARKER was thereupon called as a witness for defendant, and being duly sworn, testified as follows:

"I am the City Clerk of the City of Monterey, and have been such since April, 1898. I received a seal and books from my predecessor in office. I have that seal here. (The witness here produces the same seal concerning which the witness, Williams, testified. He then made an impression with it, which impression was thereupon introduced in evidence and marked "Defendant's Exhibit 'E,' "
117 it being the same as "Defendant's Exhibit 'A' "). I did not receive any papers from my predecessor in office, no bonds, oaths of office, or election returns.

Cross-examination:

I received two minute books—A and B—from my predecessor. My predecessor was Mr. S. J. Duckworth."

Defendant thereupon produced and exhibited in evidence the original records of deeds from the office of the County Recorder of the County of Monterey from the 7th day of February, 1859, to the 2nd day of April, 1866, both inclusive, in which records is found a record of the deed purporting to have been made by the City of Monterey to David Jacks and D. R. Ashley, theretofore introduced in evidence by defendant, and from which records it appeared that there was not, on the 2nd day of April, 1866, therein any record of any other conveyance dated subsequent to the 8th day of February, 1859, purporting to convey any of the Pueblo lands of the City of Monterey."

EDWIN L. WILLIAMS was thereupon recalled as a witness for defendant, and testified as follows:

"On June 11th, 1859, I was acting as Deputy County Clerk
118 of the County of Monterey. The writing in Book D of Deeds, being the record of said conveyance purporting to be from the City of Monterey to Jacks and Ashley is all in my handwriting. The words "Monterey City Seal" on that record are in my handwriting, and were written when the deed was recorded.

Cross-examination:

I have no independent recollection of recording that deed. I cannot understand the reason why the words "Monterey City Seal" are written in a smaller hand than the rest and somewhat cramped. I imagine it was due to want of space."

Defendant thereupon offered and read in evidence a deed from Delos R. Ashley to David Jacks, dated September 14th, 1868, and recorded in the office of the Recorder of the County of Monterey in Book M of Deeds, on pages 255 and following, which includes the land in controversy in this action.

Defendant thereupon offered and read in evidence from the said minute book, entitled "Records of the City Council and the Board of Trustees—A," the minutes of the meetings of January 24th, 1859;

January 25th, 1859; February 9th, 1859; November 14th, 1859; January 26th, 1860, and February 23rd, 1860, as follows:

119 Minutes of January 24th, 1859, heretofore set out in this Bill of Exceptions, on pages 46 and 47. [Appearing on page 106 fol. 318 of this Transcript.]

Minutes of January 25th, 1859, heretofore set out in this Bill of Exceptions on pages 47 and 48. [Appearing on page 107 fol. 321 of this Transcript.]

Minutes of February 9th, 1859, heretofore set out in this Bill of Exceptions on pages 48 and 49. [Appearing on page 110 fol. 328 of this Transcript.]

Minutes of November 14th, 1859, as follows:

"At a meeting of the Board of Trustees of the City of Monterey held on the 14th (instant) day of November, 1859, was presented by B. F. Ankeny a petition praying that he have leave to construct a stairway from the street in front of the Pacific (Hotel) House in said City. After filing and considering said petition, it is by the Board ordered that said Ankeny be and he is hereby granted leave to construct said stairway according to the plan specified in said petition. Provided the same does not obstruct or prevent persons from passing over the sidewalk and provided further that said leave to

120 continue said stairway shall be at the will and pleasure of said Trustees or their successors in office.

JOHN BURKE PHILLIPS, *President.*
J. D. CALLAGHAN, *Clerk.*"

Minutes of January 26th, 1860, as follows:

"*No.* 1.—*Order—In Relation to Hogs, etc.*

The People of the City of Monterey by and through the Board of Trustees of said City, do ordain as follows:

SECTION 1. That on and after the first day of February, A. D. 1860, it shall not be lawful for any person or persons, the owner or owners of, or who may have control or charge within said City limits of any hog, hogs, shoats, pigs or swine to let, allow or suffer the same to run, or go at large within limits of said City.

SEC. 2. That for each and every violation of the provisions of Section first of this ordinance, the person or persons so violating shall be fined in the sum of fifty dollars, for each of said animals, which he, she, or they, shall allow or suffer to go at large, contrary to the provisions of Section first hereof.

SEC. 3. That any or all of said Trustees shall have author-

121 ity to enforce this ordinance and to receive for the use of said City all fines recovered under the same.

City of Monterey, January 26, 1860.

JOHN BURKE PHILLIPS, *President.*
J. D. CALLAGHAN, *Clerk.*"

Minutes of February 3rd, A. D., 1860, as follows:

"Order No. 2.—In Relation to Hogs, etc.

The people of the City of Monterey by and through the Board of Trustees of said City, do ordain as follows:

SECTION 1. That all hogs, shoats, pigs and swine now or hereafter going at large within the lim[illegible]e City of Monterey are hereby declared a nuisance, and the [illegible] of said City shall have all of said animals collected toget[illegible] place provided for the same when said Trustees shall imm[illegible]ly proceed to have said nuisance abated in such manner as they shall hereafter order.

Monterey City, February 3rd, A. D., 1860.

JOHN BURKE PHILLIPS, *President.*
J. D. CALLAGHAN, *Clerk.*"

122 Defendant here rested.

Plaintiff thereupon offered and read in evidence in rebuttal the following entry from the Book of Minutes of the Board of Trustees of said City of Monterey under date of June 23rd, 1865, a copy whereof is as follows:

"At a meeting of the Board of Trustees of the City of Monterey, at Dr. Canfield's office, June 23rd, 1865, there being present a full Board, a preliminary examination into the state of the affairs of the City was made; and it appearing that the sale of the City lands to D. Jacks and D. R. Ashley, on Feb. 9th, 1859, was unauthorized and illegal; it was ordered that David Jacks and others be notified by the Clerk that the Board is ready to receive any proposition from him or them to negotiate with the City for the relinquishment by Jacks and others of any and all claims that he or they may have to City lands or other property of the City of Monterey, and for a general settlement of accounts between the parties mentioned and the City.

(Signed) MAN'L DIAZ, *President.*
(Signed) C. A. CANFIELD, *Clerk.*"

123 S. J. DUCKWORTH was thereupon recalled as a witness for plaintiff, in rebuttal, and testified as follows:

"The book which I now produce is the ordiuance book of the City of Monterey."

Plaintiff thereupon offered and read in evidence from said book an ordinance under date of February 7th, 1853, of which the following is a copy:

"Ordinance in Regard to City Seal.

The Council of the City of Monterey do ordain as follows:

74.

That the ordinance establishing the Seal of the City passed April 11th, 1850, be and the same is hereby repealed.

Passed and approved at Monterey City, February 7th, 1853.

L. F. LOVELAND, C. C. C., *Mayor,*
Pr. O. HY. EDGER, *Deputy.*"

Plaintiff thereupon offered and exhibited in evidence the whole of the said book of ordinances, from which it appeared that from February 7th, 1853 to February 9th, 1859, both inclusive, there was no ordinance adopting any seal for said City."

124 (Witness continuing:) "In the original of ordinance No. 72, which was passed February 7th, 1853, authorizing Merritt, Gonzales and Phillips to employ counsel to present the claim of the City before the Board of Land Commissioners, there is a recital that there is no official seal.

JOHN H. GARBER was thereupon called as a witness for plaintiff in rebuttal, and being duly sworn, testified as follows:

"I was Deputy Clerk of Monterey County when the County buildings were burned. No papers in the Clerk's office were burned at that time. They were kept in a brick vault and did not suffer.

Cross-examination:

All the records and books were kept in that vault; the minutes of the Court proceedings, and Supervisors' minutes and all the papers, such as bonds, court papers, court cases and such things. There are no papers of any character that are not kept in that vault, of any kind or nature. I do not remember any oaths of office that were filed in the year 1858 or 1859 in the Clerk's office. There were none in the office proper; that is, in the office that was burned.
125 They were not kept there; they were kept in the vault. Only law books were kept outside."

Plaintiff thereupon rested in rebuttal.

The foregoing is all the testimony in the case.

Thereupon, after argument by counsel, the cause was submitted and by the Court taken under advisement, and thereafter the Court filed its findings of fact and conclusions of law, which will be found in the judgment roll herein; and thereafter, on the 10th day of October, 1899, and within due time, the plaintiff served upon the attorneys for the defendant, and filed in the Court a notice of which the following is a copy:

[Title of Court and Cause.]

(Superior Court Nos. 1850 and 2762.)

"To the defendant above named and to Messrs. Freeman & Bates, his attorneys:

You will please take notice that the plaintiff herein will move the Honorable Court above named to vacate and set aside its decision and judgment in favor of the defendant and against the plaintiff,
126 made and entered in the above entitled action on the 27th day of September, 1899, and to grant a new trial therein, upon the following grounds:

First: Insufficiency of the evidence to justify the decision;

Second: Accident and surprise, which ordinary prudence on the part of plaintiff could not have guarded against;

Third: Newly discovered evidence, material to the cause of plaintiff, which it could not, with reasonable diligence, have discovered and produced at the trial;

Fourth: That said decision is against law;

Fifth: Errors in law occurring at the trial and excepted to by the plaintiff.

Said motion will be made upon a Bill of Exceptions to be hereafter served, proposed, settled, allowed and filed as required by law.

Dated, October 10th, 1899.

ROBERT S. FORBES,
Attorney for Plaintiff.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel."

And the plaintiff now specifies the following particulars in which the evidence is insufficient to justify the decision of the Court:

127 I.

The evidence is insufficient to justify the finding of the Court that the plaintiff is not the owner nor entitled to the possession of any part of the land described in the complaint.

II.

The evidence is insufficient to justify the finding of the Court that the plaintiff is not the owner nor entitled to the possession of any part of the land described in the complaint, in this: that the evidence shows that all of the said land had been, prior to the commencement of this action, patented by the United States to the plaintiff, and that the plaintiff had never conveyed to any person any part of said land, and that the pretended conveyance from plaintiff, under which defendant claims title, is void and conveyed no title.

III.

The evidence is insufficient to justify the finding of the Court that the defendant is the owner of any part of the land described in the complaint.

IV.

The evidence is insufficient to justify the finding of the Court that the defendant is the owner of any part of the land described in the complaint, in this: that the evidence shows that all of the
128 land aforesaid had been, prior to the commencement of this action, patented by the United States to the plaintiff, and that the plaintiff had never conveyed to any person any part of said land, and that the pretended conveyance from plaintiff, under which defendant claims title, is void and conveyed no title.

And plaintiff now specifies the following errors of law occurring at the trial and excepted to by the plaintiff on which it will rely on its motion for new trial and on appeal:

1. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness Edwin L. Williams:

"Q. Do you know who, in the year 1859, and prior to February 9th, were acting and commonly reputed to be the trustees of the Town of Monterey?" [Appearing on page 84 fol. 250 of this Transcript.]

2. The Court erred in overruling the objection of the plaintiff to the following question propounded by defendant to the witness John D. Porter:

"Q. Who were they?" [Appearing on page 86 fol. 256 of this Transcript.]

3. The Court erred in overruling the objection of plaintiff
129 to the following question propounded by the defendant to the witness J. S. Finch:

"Q. Who were?" [Appearing on page 86 fol. 258 of this Transcript.]

4. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness Austin:

"Q. Who were?" [Appearing on page 88 fol. 262 of this Transcript.]

5. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness Austin:

"Q. Who, after that election, were reputed to be and acting as Trustees of the City of Monterey?" [Appearing on page 88 fol. 263 of this Transcript.]

6. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness Austin:

"Q. After the election in which you speak of these men being candidates, who, after that, were reputed to be and commonly known to be the Trustees of the City of Monterey?" [Appearing on page 88 fol. 264 of this Transcript.]

7. The Court erred in overruling the objection of plaintiff
130 to the following question propounded by defendant to the witness, M. C. Ireland:

"Q. Who, on the 9th day of February, 1859, and before that, and during all the year 1859, were commonly reputed in Monterey to be the Trustees of the City of Monterey?" [Appearing on page 89 fol. 267 of this Transcript.]

8. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness David Jacks:

"Q. Who were they?" [Appearing on page 90 fol. 270 of this Transcript.]

9. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness David Jacks:

"Q. Do you remember who, from and after that election, for some years afterwards, were reputed to be and acted as Trustees of the City of Monterey?" [Appearing on page 91 fol. 272 of this Transcript.]

10. The Court erred in overruling the objection of plaintiff to the following question propounded by defendant to the witness David Jacks:

"Q. Did you owe them any money; what did they want
131 this money for?" [Appearing on page 93 fol. 277 of this Transcript.]

11. The Court erred in admitting in evidence the deed purporting to be made by the City of Monterey to D. R. Ashley and David Jacks. [Appearing on page 93 fol. 279 of this Transcript.]

12. The Court erred in admitting in evidence the papers marked "Defendant's Exhibit 'B.'" [Appearing on page 100 fol. 299 of this Transcript.]

13. The Court erred in admitting in evidence the paper marked "Defendant's Exhibit 'C.'" [Appearing on page 106 fol. 318 of this Transcript.]

14. The Court erred in admitting in evidence the paper marked "Defendant's Exhibit 'D.'" [Appearing on page 112 fol. 336 of this Transcript.]

Wherefore, to the end that the proceedings and exceptions aforesaid may be and remain of record, the plaintiff now presents this, its Bill of Exceptions, and prays that the same may be settled and allowed by the Court.

ROBERT S. FORBES,
Attorney for Plaintiff.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel.

132 I agree to the foregoing Engrossed Bill of Exceptions.

JOHN FLOURNOY,
Attorney for Defendant David Jacks.

I hereby certify that the foregoing Bill of Exceptions has been presented to me, the Judge who tried said cause in due time, and the same is hereby settled and allowed as the Bill of Exceptions on Mo-

tion for New Trial and on Appeal from the Judgment in said cause, and certified to be correct.

Dated, February 20th, 1900.

N. A. DORN,
Judge of the Superior Court.

[Endorsed:] "Filed, February 20th, 1900. J. D. Kalar, Clerk."

Minute Order Denying Motion for New Trial.

(Superior Court Nos. 1850 and 2762.)

WEDNESDAY, *February* 28, 1900.

[Title of Cause.]

Plaintiff's motion for a new trial herein comes on for hearing at this time, and a stipulation being on file herein stipulating that said motion be submitted without argument, it is ordered that said
133 motion be submitted; and the Court being now fully advised in the premises, said motion is denied.

(Copy of Minutes, Book "I," page 593).

[Title of Court and Cause.]

Notice of Appeal from Order Denying Motion for New Trial.

(Superior Court Nos. 1850 and 2762.)

To the defendant above named and to John Flournoy, Esq., his attorney:

You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of California from the order heretofore made and entered in said action, denying plaintiff's motion for a new trial.

Dated, April 3rd, 1900.

ROBERT S. FORBES,
Attorney for Plaintiff.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel for Plaintiff.

[Endorsed]: "Filed, April 4th, 1900, J. D. Kalar, Clerk."

134 *Stipulation as to Correctness of Transcript.*

It is hereby stipulated that the foregoing printed pages constitute a correct transcript of the records of the appeals of the plaintiff from the judgments and from the orders denying motion for new trial in the cases of The City of Monterey *vs.* Jacks, *et al.*, Superior Court, No. 1850, and The City of Monterey *vs.* Jacks, *et al.*, Superior Court,

No. 2762; and contain full true and correct copies of the pleadings, papers, records and proceedings therein referred to, together with all endorsements thereon.

Dated this 16th day of May, 1900.

ROBERT S. FORBES,
Attorney for Plaintiff and Appellant.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel for Plaintiff and Appellant.

JOHN FLOURNOY,
Attorney for Defendant and Respondent.

134½ I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Transcript filed May 17th, 1900, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Supreme Court of California.]

FRANK C. JORDAN, *Clerk.*
By G. H. S. DRYDEN, *Deputy.*

135 In the Supreme Court of the State of California.

Superior Court, *Co.* 1850.

THE CITY OF MONTEREY (a Municipal Corporation), Plaintiff and Appellant,
vs.
DAVID JACKS, Defendant and Respondent.

Whereas, the same issues are involved in the above entitled action as in the case of "The City of Monterey, plaintiff, *vs.* David Jacks, *et als.*, defendants, Superior Court, No. 2762"; and whereas, the same proceedings were had and the same testimony introduced in both actions;

Now, therefore, It is hereby Stipulated and agreed by and between the parties to the above entitled action, that the appeal from the judgment and from the order denying plaintiff's motion for a new trial in said action be submitted to the Supreme Court of the State of California on the Transcript and Briefs on appeal to be filed in the action of "The City of Monterey, plaintiff, *vs.* David Jacks, *et als.*, defendants, Superior Court No. 2762, now on appeal to said Court; and that the same decision be rendered herein as in said action.

Dated this 7th day of April, 1900.

ROBERT S. FORBES,
Att'y for Plaintiff.

PRINGLE & PRINGLE,
MASTICK, VAN FLEET & MASTICK,
Of Counsel for Plaintiff.

JOHN FLOURNOY,
Att'y for Defendant, David Jacks.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a stipulation filed May 17th, 1900, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Supreme Court of California.]

FRANK C. JORDAN,
Clerk.

By G. H. S. DRYDEN,
Deputy.

135½ [Endorsed:] S. F. 2350. Copy. The City of Monterey, Pl't'ff & App., *vs.* David Jacks, Def't & Resp. Stipulation.

136 In the Superior Court of the State of California.

Superior Court, No. 1850.

THE CITY OF MONTEREY (a Municipal Corporation), Plaintiff and Appellant,

vs.

DAVID JACKS, Defendant and Respondent.

It appearing to the Court from the Stipulation of the parties on file herein that the same issues are involved in the above entitled action as in the case of "The City of Monterey, Plaintiff, *vs.* David Jacks," No. 2762, Superior Court, and that the same proceedings were had and the same testimony introduced upon the trials in both actions;

Now Therefore, It is ordered that the appeals from the judgments and from the orders denying the plaintiff's motion for a new trial in both actions may be submitted to the above named Court upon one set of transcripts and one set of briefs, except that an original transcript and original briefs must be filed in each case.

Dated, April 24, 1900.

BEATTY, *C. J.*
McFARLAND, *J.*
VAN DYKE, *J.*
TEMPLE, *J.*

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order filed May 17, 1900, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Supreme Court of California.]

FRANK C. JORDAN,
Clerk.

By .....
Deputy.

36½ [Endorsed:] S. F. 2350. City of Monterey *v.* Jacks. Order.

37 S. F. Nos. 2349-2350. In Banc. July 11, 1903.

THE CITY OF MONTEREY, Plaintiff and Appellant,
vs.
DAVID JACKS, Defendant and Respondent.

MUNICIPALITIES—OWNERSHIP OF LAND BY—CONTROL OF PUEBLO LANDS.—There is a marked difference between lands which are held by a municipality in trust for public, municipal purposes, such as pueblo lands and lands acquired by a municipality through purchase or special grant, and held in proprietary right. In the one case, the lands being simply ancillary to the public trust—lands in which the pueblo never had an indefeasible proprietary interest and which were subject to the supreme political dominion of the former Mexican government, became equally subject to the sovereignty of the State of California, through its legislature, upon the change of government. In the other case, when the legislature has conferred on a municipality the right to acquire and hold property, such property when so acquired is invested with the same security as other private rights of property, and unless with the consent of the municipality, its disposition, so as to deprive the municipality of it, cannot be interfered with by the legislature to any greater extent than can the property of individuals.

PUEBLO LANDS—CONTROL OF LEGISLATURE OVER.—Under the Mexican law the officers of a pueblo were empowered to make grants of the pueblo lands, the pueblos had no indefeasible proprietary interest in them; they were held in trust for public and municipal purposes, subject to the control and disposition of the Mexican government; and upon the establishment of our state government it succeeded to the same sovereignty over them as was exercised by the former government, and their control and disposition come fully, entirely and absolutely within the power of the legislature as representing such sovereignty.

PUEBLO LANDS—POWER OF LEGISLATURE TO AUTHORIZE CONVEYANCE OF—CONFIRMATION OF DEED.—The pueblo lands held by the city of Monterey, being under the control of the legislature it was within the power of that body to originally confer upon the trustees of the city of Monterey, as well as to confirm a deed made by it, and the act of April 2, 1866, amending the act to incorporate the city of Monterey, had the effect of confirming the grant theretofore made to the lands in question. The power of the legislature over such lands was not limited, and its authority to sell them was not restricted to limited quantities, nor was it prohibited from confirming a sale of them in their entirety.

AGENCY—RATIFICATION OF UNAUTHORIZED ACT.—Where authority exists to empower an act to be originally done, and the power is attempted to be exercised by an agent without authority, or contrary to a mode provided for its exercise, such attempted exercise of power may be ratified by the principal, and where so ratified operates as effectually as if the authority was originally conferred and properly exercised, and this rule applies as well to municipalities as to individuals.

DEEDS—EXECUTION BY CITY—EVIDENCE OF AUTHORITY OF OFFICERS.—Where a deed to pueblo lands recites that it is executed between the city of Monterey through the trustees of said city, to wit, John Burke Phillips, as president, and Salvador Osio, as treasurer, and John D. Callaghan as clerk; has affixed to it what purports to be the official seal of the city; contains a resume of the proceedings taken by the board of trustees and leading up to the execution of the deed; and is acknowledged by them in the respective capacities in which they executed it, and is recorded, if the recitals in the deed, the certificate of acknowledgment, and the recordation were not *prima facie* proof that the parties executing it were the trustees, evidence to show that the parties were the acting trustees of the city; that they were known to be such from common report, and there was produced from the archives of the city a record containing the minutes of the board of trustees of the city showing the proceedings under which the sale was made, and further showing that these parties for a considerable length of time transacted the city's business, is sufficient to establish that they were *de facto* officers, and that having been proven, their legal selection will be presumed until the contrary is shown. The presumption is indulged in that a person acting in a public office was regularly appointed to it.

DEEDS—RATIFICATION—EFFECT OF.—An act ratifying and confirming a conveyance operates, not only to ratify the unauthorized sale made under it, but to cure all defects in the form and
138 manner of the execution of the conveyance itself; and the omission of the seal of a city from a deed executed by its trustees is an infirmity which would be cured by a confirmatory act.

EVIDENCE—COMMON REPUTE AS TO PUBLIC OFFICERS.—There is no error in admitting in evidence, in an action by a city to quiet title to pueblo lands which it is alleged to have conveyed, that the persons who signed the deed were commonly reputed to be the trustees of the city at that time.

Appeal from the Superior Court of Monterey County—N. A. Doran, Judge.

For Appellant, Robert S. Forbes; Pringle & Pringle, and Mastick, Van Fleet & Mastick, of Counsel.

For Respondent, John Flournoy and Ralph C. Harrison.

Actions to Quiet Title.

Monterey at the date of the cession of California to the United States was a Mexican pueblo, and by special concession from the Spanish Crown was entitled to more than the four square leagues of land generally allotted to pueblos. The City of Monterey was incorporated by an Act of the Legislature of this State, of date March 30, 1850, and thereunder succeeded to all the legal rights and claims of the former pueblo to its pueblo lands. On March 2, 1853, said city, by its attorney, D. R. Ashley, duly retained for that purpose by the city, presented to the United States Board of Land Commissioners its petition, praying for a confirmation of the Pueblo grant to the Pueblo of Monterey, and a decree was made accordingly on January 22, 1856, confirming its title. An appeal was taken from this decree by the United States, which appeal was on June 16, 1858, dismissed, with leave to the city to proceed upon the commissioners' decree as a final decree of confirmation. In 1857 the original act incorporating the city of Monterey was amended, and by section 7 thereof it was provided as follows: "The trustees may also pay for the expenses of prosecuting the title of the city before the United States land commissioners and before the United States courts, and for that purpose may sell and transfer any property, right, or franchise, upon such terms and for such prices as may by them be deemed reasonable." On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such Pueblo claim to the commissioners. The claim was approved and allowed, and there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the Pueblo lands of the city, or so much of them as might be necessary to pay the claim of said Ashley, be made at public auction on the 9th day of February, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire Pueblo tract was bid in by the said D. R. Ashley and the defendant, David Jacks, for the sum of $1,002.50, being the amount of the indebtedness and the necessary expenses of sale; no one offering to purchase less than the whole, or bid a higher amount. Thereafter said trustees made, executed and delivered a conveyance of said lands, dated February 9, 1859, but acknowledged February 12, 1859, in favor of said D. R. Ashley and the defendant, David Jacks, and in the conveyance the proceedings taken by the trustees in the matter of such sale were recited. This conveyance was recorded in the county recorder's office of the county of Monterey, on June 11, 1859. On April 2, 1866, the act to incorporate the city of
139 Monterey was amended to read as follows: "Sec. 2. All sales and conveyances made by the corporate authorities of said city since the 8th day of February, 1859, and which conveyances purport to have been recorded in the county recorder's office of Monterey county, purporting to convey public lands, or, lands confirmed to said city of Monterey, in pursuance of the act of congress of March 3, 1851, and entitled an act to ascertain and settle the

private land claims in the state of California, are hereby ratified and confirmed." On September 4, 1869, Ashley conveyed all his interest in the land in controversy to the defendant.

During the trial below it was proven by production of the records of deeds from the office of the county recorder of Monterey county, that between February 7, 1859, a few days prior to the execution of the deed in question, and the second day of April, 1866, the date of the passage of the act, there was no record of any other conveyance by the corporate authorities of said city, purporting to convey any of the Pueblo lands of the city of Monterey, other than the conveyance to said Ashley and Jacks.

The patent of the United States to the city of Monterey was issued November 19, 1891, and includes the land in controversy, to quiet its title to which the plaintiff shortly afterwards brought these suits. There are two cases submitted upon this appeal, and they will be both disposed of in this opinion. They are precisely similar; the parties are identical; each is an action to quiet title; both depend upon the same facts and present the same propositions of law, and differ only as to the amount of land involved in each. Judgment in both cases went for the defendant in the court below, and on this appeal it is contended on behalf of the appellant, first, that the trustees of the city of Monterey had no power under the charter to sell, or convey, the entire pueblo lands, or any considerable portion thereof as a whole, and that the sale to Ashley and defendant, Jacks, was, therefore, void; second, that the persons purporting to act as trustees of the city of Monterey, and who executed the deed to Ashley and defendant were never trustees of the city; third, that the act of April 2, 1866, did not ratify or purport to ratify the sale or deed in question; and, fourth, that the legislature had no power to ratify or validate that transaction. Errors are also assigned to rulings of the court on the admission of evidence.

The principal point in this case is relative to the power and control of the legislature, over the lands of the pueblos to which municipalities created by the legislature succeeded.

There is no doubt but that by the statute of 1857 amending the charter of the city of Monterey, that municipality was authorized to make *some* sale or transfer of its property for the very purpose for which it appears the conveyance in question was made, because it is recited in the amended charter that for such purpose the trustees may sell and transfer *any* property, right, or franchise, upon such terms as may by them be deemed reasonable. That this sale was attempted to be made, and all the proceedings were regularly taken, under that provision of the charter, is unquestionable, and certainly they were empowered to make a sale of at least *some portion* of the lands. If they had done this there could hardly arise any question as to the validity of such a transaction.

It is insisted by the attorney for the respondent that this sale under such charter provision was valid, independent of any confirmatory act of the legislature. As this, however, involves the power of the legislature to authorize such a sale, which appellant denies, the whole subject will have to be examined, both as

to the original and confirmatory power of the legislature over Pueblo lands, and we simply here refer to the statute to show that thereunder a power of sale to some extent at least was given, and that the confirmatory act of 1866, if effectual at all, was undoubtedly intended to validate the attempted exercise of that power, if irregularly or improperly exercised in making the deed in question, and to the extent that it purported to be made. It may be conceded, as insisted by appellant, that the lands granted to a Mexican pueblo were in trust for the benefit of its inhabitants, and that after the incorporation of the pueblo into a city by the legislature, these trusts remained the same in their general nature, and that the municipal authorities had no power to alienate these lands in gross, but the question in the case is, not what power the pueblo or the city, of itself, had over the pueblo lands, but what power or control the legislature had over them, and what authority it could confer upon the city with reference to their disposition, and to what extent it could ratify an attempted, but unauthorized, sale thereof. Because, if the legislature in the first instance could have empowered the city in general terms to dispose of all its pueblo lands, it certainly had the authority, if an unauthorized disposition was made of them by the municipality, to confirm such a conveyance. It is a familiar principle of law that if authority could be originally conferred, its unauthorized exercise may be subsequently ratified. Ratification by its very terms assumes power to grant original authority, and, if the power exists, the ratification can be as broad and extensive as the original authority might have been extended or conferred.

It is to be borne in mind, while discussing these cases, that the transactions here involved occurred almost half a century ago, and that the control of the legislature over pueblo lands is to be measured by the terms of the constitution of 1849, under which it was exercised.

To what extent that control existed in the legislature was a matter which in the early history of this state came before this court for determination in several cases, the earliest of which is almost co-temporaneous with the transactions here involved, and the general principle there announced relative to the control of the legislature over pueblo lands has ever since been adhered to. This is the case of *Hart v. Burnett*, 15 Cal. 530. The court there learnedly and exhaustively discussed the origin of pueblos, their right and title to pueblo lands, the nature and extent of the trusts under which they were held, and the power and control of the legislature over them upon the establishment of our state government. Upon this latter subject the court (and we state the general conclusions without lengthy excerpts from that case), says: "These municipal lands to which the city of San Francisco succeeded, were held in trust for the public uses of that city. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the state sovereignty. The act of the legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave

full effect to the provision of that ordinance, and vests in the
141 possessors therein described, as against said city and state, a title to the lands in said ordinance mentioned." The same doctrine was subsequently affirmed in *Payne v. Treadwell*, 16 Cal. 233, which also involved the validity of the confirmatory act of the legislature operating on the Van Ness ordinance, and the court says: "Conceding for the argument, then, that these alcalde grants were not valid because not authorized, we cannot say, if either by the act of congress or otherwise the city of San Francisco had title to these lands, that the legislature had not authority for the reasons given in *Hart v. Burnett* to validate the grants made in her name, or the name of her predecessor. Possessing the general political dominion, and this property belonging to a political corporation deriving all of its powers from the political authority, the legislature is competent to validate an act already done for the disposition of this property, as well as to authorize it beforehand. This we understand to be the effect of the authorities cited in *Hart v. Burnett* in the original opinion and that on the petition for rehearing. * * * The agents of the corporation can sell or dispose of this property of the corporation only in the way and according to the order of the legislature, and, therefore, the legislature may by law operating immediately upon the subject dispose of this property or give effect to any previous disposition or attempted disposition of it. The property itself is a trust, and the legislature is the prime and original controlling power managing and directing the use, disposition and direction of it. Otherwise the solecism would appear of a derivative power higher in degree and different in kind from the source of its derivation."

To the same effect it is said in *San Francisco v. Canavan*, 42 Cal. 552: "In discussing the second ground on which the act is alleged to be unconstitutional, it becomes material to inquire into the tenure by which the title to this land was acquired and is now held by the city and county. * * * The nature of the title has been so often discussed and repeatedly adjudicated by this court that it would now be a work of supererogation to undertake anew a critical analysis of it. It will be sufficient to state generally that it has been established by those decisions, too firmly to be shaken or overthrown at this late day, that neither the former pueblo, nor the city and county, as its successor, ever held an indefeasible proprietary interest in these lands. On the contrary, they were and are held only in trust for certain municipal purposes. Under the Mexican system, while the pueblo might dispose of the lands, or use them in pursuance of the trust on which they were held, they were nevertheless subject to the disposition of the governor without the consent of the municipal authorities. On the change of government, what had before been known as the pueblo of Yerba Buena was incorporated as the city of San Francisco, and afterwards as the city and county of San Francisco. * * * Whilst the Mexican government exercised dominion over this territory, it had the power to direct how the trust should be executed by the pueblo, and to enlarge or limit its powers in respect to the disposition of these lands; and when California was erected into a state of the American Union, it succeeded

the power which the government of Mexico had before exercised
er its municipalities. * * * These authorities conclusively
tablish that the tenure by which these lands are held is wholly dif-
ferent from that by which lands acquired by a municipality
12 by gift or purchase are ordinarily held; and whatever may be
the extent of the legislative power over the latter class of lands,
ere can be no doubt, I think, that in respect to pueblo lands it is
mpetent for the legislature to control and direct how they shall be
anaged and controlled or disposed of by the municipal corpora-
on."

These cases at an early date so effectually disposed of this point that
tle further presentation of it has since been deemed necessary, and,
hile the court in these cases was discussing the matter of pueblo
nds as contained in the pueblo of Yerba Buena, to whose rights the
y of San Francisco succeeded, still the same rule would apply to all
eblos established in California under the Spanish or Mexican law
d incorporated into California municipalities, as they were all laid
t on the same general plan and vested with the same general
wers concerning their lands. Upon this subject, counsel for appel-
nt has cited us to no case in this state holding a contrary view. He
ntends that some of the language in *Hart v. Burnett* sustains his
sition, but the language to which he calls attention was used by
e court in discussing the status of pueblo lands under the Mexican
w solely, after doing which the court then discussed its status
der the law of this state, and it is the conclusion of the court on
is latter point to which our quotation from the case is directed.
ither has the other case cited (*Redding v. White*, 27 Cal. 282)
y bearing upon the subject. It determines solely the question
the power of the pueblo under the Mexican law to deal with its
nds. The grant there involved was one made by the alcalde under
e Mexican law. The point of legislative control over pueblo lands
s not, and could not be, there involved.

Some cases from foreign jurisdictions have been cited, but these,
cessarily have no special application, as they did not involve
eblo lands. The general principle which they decide is, that
ere land is acquired by a municipality through purchase or de-
e, or is specially granted to it by the state, the municipality stands
relation to the land so acquired the same as a private individual,
d, that it is beyond the power of the state to control its disposition,
thout the consent of the municipality.

There is a marked difference, however, between lands which are
ld by a municipality in trust for public, municipal purposes, such
pueblo lands, and lands acquired by a municipality through
rchase or special grant, and held in proprietary right.

And if this distinction is kept in mind, it obviates all difficulty in
ermining when the legislature has absolute control and when it
s no control.

In the one case, the lands being simply ancillary to the execution
the public trust—lands in which the pueblo never had an inde-
sible proprietary interest—and which were subject to the supreme
litical dominion of the former Mexican government, became

equally subject to the sovereignty of the state of California, through its legislature, upon the change of government. In the other case, when the legislature has conferred on a municipality the right to acquire and hold property, such property when so acquired is invested with the same security as other private rights of property, and, unless with the consent of the municipality, its disposition, so
143 as to deprive the municipality of it, cannot be interfered with by the legislature to any greater extent that can the property of individuals. This distinction was clearly pointed out in *Grogan v. San Francisco*, 18 Cal. 615. This case appellant confidently cites as supporting his position here. It not only does not do so, but clearly points out the marked difference between the control the legislature has over land held in trust by the city for general municipal purposes, such as pueblo land, and its control over land acquired by the city for municipal uses by special grant or purchase, and held in proprietary right.

This last case was in relation to the "City Slip Property," which the legislature had granted to San Francisco under what is known as the "Beach and Water Lot Act."

It was a special grant by the state to the city of San Francisco, of land which was not embraced within the original pueblo lands, and which belonged to the state.

After the grant, the legislature undertook to control the disposition of it without the consent of the city, and its power to do so was denied by his court. It was held, in harmony with the general rule above stated, that this land, having been acquired by special grant from the state, was held under the same right by the city as the property of an individual is held, and not subject to legislative control without municipal consent.

And in order that there might be no doubt as to the difference in the rule governing the power of the legislature over the two classes of property, and so that the rule in *Grogan v. San Francisco* might not subsequently be cited as militating with the rule declared in *Hart v. Burnett* and *Payne v. Treadwell*, the court, in the Grogan case, expressly points out that difference, and concludes its opinion in the following language: "The cases of *Hart v. Burnett*, 15 Cal. 530, and *Payne v. Treadwell*, 16 Cal. 222, cited by the counsel of the appellant, do not conflict with the views we have expressed as to the authority of the legislature over the property of a municipal corporation. They both treat of lands held by the city of San Francisco as successor of the former pueblo, and of the power of the legislature to validate a grant of such lands previously made by the act of the city. Those lands were held by the pueblo, and the city as its successor, in trust for public municipal purposes, and the trust was subject to the direction, supervision and control of the government. The cases cited have no application to a case like the present, where the legislature has undertaken to divest property which is not held upon any such trusts, without the city's previous consent, or the city's subsequent acceptance of its act." (*Grogan v. San Francisco*, 18 Cal. 615.

We are satisfied from the above authorities that while under the

Mexican law the officers of a pueblo were empowered to make grants of the pueblo lands, yet the pueblos had no indefeasible proprietary interest in them; that they were held in trust for public and municipal purposes, subject to the control and disposition of the Mexican government; that upon the establishment of our state government it succeeded to the same sovereignty over them as was exercised by the former government, and that their control and disposition came fully, entirely and absolutely within the power of the legislature as representing such sovereignty.

144 And, as the full and complete control of said lands was a matter within the power of the legislature, it could have originally conferred upon the trustees of the city of Monterey (if under the act it did not) the right to dispose of them. We think also that there is no doubt but that the legislature had the power to confirm the deed in question, and that the act in question here operated to effect that purpose.

As before stated, it is a principle of law that where authority exists to empower an act to be originally done, and the power is attempted to be exercised by an agent without authority, or contrary to a mode provided for its exercise, such attempted exercise of power may be ratified by the principal, and when so ratified operates as effectually as if the authority was originally conferred and properly exercised, and this rule applies as well to municipalities as to individuals.

Under the old constitution, which made it possible for the legislature to indulge in this species of legislation, it was not uncommon in amending the charters of cities to insert therein provisions similar to the one under consideration, and this court has had occasion to deal with this precise question growing out of such legislation in the case of *Thompson v. Thompson*, 52 Cal. 157. There a deed of the pueblo lands signed by the president and trustees of Santa Barbara was assailed on the ground that it had not been shown that the trustees had any power to make the grant, and the question was there, as here, as to the effect of a confirmatory provision in the amended charter of that city. The court said: "If there was any infirmity in the deed from the town authorities to Espinosa, for want of authority or legal capacity to make it, the defect was cured by the third section of the Act of February 4, 1872 (Stat. 1871-72, p. 78), which enacts that 'all acts and proceedings of the board of trustees of the said town since the first day of January, 1870, are hereby approved and confirmed.' This deed was made after that date and before the passage of the act, and as the land in controversy was a part of the pueblo lands confirmed and patented to the town of Santa Barbara, it was for the legislature to direct in what manner they should be disposed of. A subsequent approval by the legislature of a prior disposition of the land by the town authorities was equivalent in law to a previous authority so to dispose of them." To the same effect are *Hart v. Burnett*, 15 Cal. 530, and *Payne v. Treadwell*, 16 Cal. 221, to which we have heretofore referred. In fact those cases, while discussing the general power of the legislature over the control and disposition of pueblo lands, were dealing specially with confirmatory acts of the legislature concerning them. In this same line are the cases *San Francisco v.*

Beideman, 17 Cal. 462; *Gordon v. City of San Diego*, 101 Cal. 522, and *Oakland v. Oakland Water Front Co.*, 118 Cal. 194.

It would hardly be necessary to discuss these two propositions separately if it were not for an additional objection urged by appellant against the power of the legislature to either originally authorize or subsequently confirm a sale of pueblo lands to the extent that was attempted by the trustees in this instance, because the power to confirm implies the power to authorize, and when one is proven the other exists as a necessary legal consequence. This objection is that the only power and control that the legislature had over the pueblo lands was limited in extent, and that it could only authorize their sale or
145 disposition in limited quantities; that it could not authorize, hence could not confirm, a sale of them in an entirety. Our attention has not been called to any such limitation in the constitution, and our examniation discloses none. No such restriction is referred to in any of the authorities cited or examined, and such a limitation could hardly exist.

Pueblos under the Mexican law were simply part of the political government of the country, and as political agencies the state succeeded to control over them upon the change of government. Whatever property they had, incidental to their existence as pueblos, was held as a municipal trust for the public use of the pueblo. As such agencies the state was under no obligation to continue their existence. In the exercise of her sovereign power she could have abolished them altogether or have incorporated them into her own scheme of government as municipalities, with such powers and restrictions as she might see fit to impose upon them. When incorporated by the legislature as municipalities under our government, the new municipalities did not by the simple fact of incorporation succeed to the rights and claims of their pueblo predecessors to the pueblo lands. The former pueblo trust and the ownership of lands incident to it had passed, with the change of flags, and vested in the State of California as succeeding sovereign. When the pueblo was by the legislature incorporated into a municipality, the act of incorporation was but the expression of the sovereign will that, in the important business of good government, a municipality should take the place of the former pueblo, modeled in such form and invested with such powers as the legislature might determine. If the new municipality acquired control of the lands of the former pueblo (as was usually the case) it did so by express provision in the act of incorporation from the state, not by virtue of any independent claim it could make as successor to the pueblo, because it was only successor by virtue if legislative grant.

So in the case under consideration, the city of Monterey acquired control of these lands, not as an incident to its creation as successor to the former pueblo of Monterey, but by express concession in the act of incorporation. It held them in trust for public municipal purposes as a chartered agent of the state, and could only hold them under such conditions and for such time as the state might permit. Its own existence as a municipal corporation depended entirely upon the will of the legislature, and the power which created it could at any time

repeal its charter and end its existence. Through such repeal the entire property held for public use—which would include the pueblo lands—would revert to the state, and no limitation being imposed upon the legislature under the constitution of 1849 in that respect, could be then disposed of in any manner it saw fit. And it is difficult to understand why, as the state could acquire this entire property through the repeal of the charter of the city of Monterey, it did not have the power to give effect, by confirmatory legislation, to the act of the city trustees in disposing of it. (*Hart v. Burnett*, 15 Cal. p. 624; *Meriwether v. Garrett*, 102 U. S. 511.) Nor does the fact that the operation of the confirmatory act was to convey these lands as an entirety affect the matter. The question is one of power and not quantity. If there was any constitutional limitation upon the extent to which the legislature could exercise its power in the
146 control and disposition of these lands, a different proposition would be presented. But there was not, and in the absence of constitutional limitation we cannot judicially impose it. It was a matter for determination by the people in creating the organic act what limitations should be placed on legislative power, and as far as the matters under consideration here are involved, none were imposed. It is competent for a legislature to exercise all powers not forbidden by the constitution, or delegated to the general government, or prohibited by the constitution of the United States; and when any person challenges an act of the legislature on the ground that it is violative of the constitution, he must point out the particular provision which he claims has been violated. While the appellant has challenged the constitutionality of this confirmatory act, it is nowhere pointed out what particular provision of the constitution has been violated. Nor could the matter of quantity be any limitation on the power of disposition. All municipalities succeeding to the control of pueblo lands were authorized by the legislature to sell portions thereof, and no one has ever seriously questioned this authority, or, its exercise. Yet when the last portion of its lands are sold by the municipality, the sum of all the portions sold is equivalent to a disposition of the whole.

It is also contended by appellant that it was not the intention of the legislature by the act of 1866 to confirm this conveyance. It could be beside the question to enter into any particular discussion concerning the rules that are to govern in determining the intent of the legislature, because it is a conceded fact in this case that the only conveyance purporting to have been made at all by the corporate authorities of said city, between the periods mentioned in the act, is the one in question here. It is, therefore, apparent that the legislative intent must have operated upon this deed, or it could not have operated at all. There is no process of reasoning whereby it could be excluded from its application.

It is further insisted by the appellant that the act of 1863 did not operate to confirm this deed because it only pretends to confirm "all deeds and conveyances made by the corporate authorities of said city, etc.," and that there is no evidence to show that the three persons who signed the deed were the trustees of the city at the time of its execu-

tion. The deed recites that it is executed between the city of Monterey through the trustees of said city, to wit, John Burke Phillips, as president, and Salvador Osio, as treasurer, and John D. Callaghan, as clerk; has affixed to it what purports to be the official seal of the city; contains a resumé of the proceedings taken by the board of trustees and leading up to the execution of the deed; is acknowledged by them in the respective capacities in which they executed it, and is recorded. If the recitals in the deed, the certificate of acknowledgement, and the recordation were not *prima facie* proof that the parties executing it were the trustees (*Middleton v. Dubuque*, 19 Ia. 474; *Gordon v. The City of San Diego*, 101 Cal. 522; C. C. P. Sec. 1951), we are satisfied it was sufficiently proven, by the respondent, as a fact. There was evidence upon that point to show that these parties were the acting trustees of the city (two of them were dead and the other was mentally and physically incapacitated from appearing or testifying at the trial); that they were known to be such from common report, and there was produced from the archives of the city
146½ a record containing the minutes of the board of trustees of the city of Monterey showing the proceedings under which this sale was made, and further showing that these parties for a considerable length of time transacted the city's business. We think this evidence was sufficient to establish that they were *de facto* officers, and this having been proven, their legal selection will be presumed until the contrary is shown. The presumption is indulged in that a person acting in a public office was regularly appointed to it. (Code of Civil Procedure, Section 1963, Sub. 14; *Nalle v. City of Austin*, 56 S. W. Rep. 954; *Gordon v. City of San Diego*, 101 Cal. 522.) There was no evidence offered by the appellant to prove the contrary, or even to raise a suspicion that these trustees were not the officials they purported to be. The appellant did introduce in evidence a resolution of the board of trustees of the city, dated June 23, 1865, reciting: "And it appearing that the sale of the city lands to D. Jacks and D. R. Ashley, on February 9, 1859, was unauthorized and illegal, &c., &c." It might readily be inferred from the language used in this resolution that these succeeding trustees would hardly have called the transaction in question here a "sale" of the city lands, if they knew that the parties purporting to be trustees had never been such officials. There is nothing in the resolution which would imply that the parties purporting to make the sale were not the legal officers of the city, but rather that the manner in which they attempted to act was beyond their power and unauthorized.

In addition it is urged that the deed executed by the trustees of the city did not have affixed to it any corporate seal. This, however, if true, would not avail the appellant. It was an infirmity in the conveyance which was cured by the confirmatory act of 1866. An act ratifying and confirming a conveyance operates not only to ratify the unauthorized sale made under it, but to cure all defects in the form and manner of the execution of the conveyance itself. The last point made is that the court erred in the admission of evidence that the persons who signed the deed were commonly reputed to be the

trustees of the city of Monterey at that time. We think the evidence was admissible. (Jones on Evidence, Sec. 204.)

We see no error in either of the judgments or the orders denying the motions for new trials, and they are all therefore affirmed.

LORIGAN, *J.*

We concur:
McFARLAND, *J.*
HENSHAW, *J.*
ANGELLOTTI, *J.*

We dissent:
VAN DYKE, *J.*
SHAW, *J.*

146¾ In the Supreme Court of the State of California. Bank.

S. F. Nos. 2349–50.

THE CITY OF MONTEREY, Pl'ff & App.,
vs.
DAVID JACKS, Def't and Resp.

On Appeal from the Superior Court of the County of Monterey.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed July 11, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk,*
By G. H. S. DRYDEN, *Deputy.*

[Endorsed:] No. 2350. In the Supreme Court, State of California. The City of Monterey, Pl'ff & App. *vs.* David Jacks, Def't & Resp. Certified Copy of Opinion.

147 Bank M. H. Argued. Due Aug. 10, 1903.

Filed Aug. 11, 1903. Frank C. Jordan, Clerk, by J. C. Crooks, Deputy.

In the Supreme Court of the State of California. In Bank.

S. F. Nos. 2349–2350.

CITY OF MONTEREY
v.
JACKS.

By the COURT:

Rehearing denied Aug. 10, 1903, Shaw, J., Van Dyke J., and Beatty, C. J. dissenting.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a Rehearing denied filed August 11, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By G. H. S. DRYDEN, *Deputy*.

[Endorsed:] S. F. 2350 County of Monterey *vs.* Jacks.

148 To the Supreme Court of the United States of America, October Term, 1904.

Ex Parte: CITY OF MONTEREY, Petitioner.

Petition for writ of error to the supreme court of the State of California to certify to the Supreme Court of the United States of America, for re-examination and reversal of the "Final judgment or decree" in the combined actions of "The City of Monterey, plaintiff and appellant, *vs.* David Jacks, defendant and respondent," (S. F. Nos. 2349, 2350) in accordance with sections 709 (amended in 1875), 1003 and 1008, U. S. Revised Statutes.

Your petitioner, The City of Monterey, in the County of Monterey and State of California, by Hamilton Gay Howard, an Attorney and Counselor of this Court, and duly authorized to appear herein in and on behalf of said City, petitions in that behalf and respectfully shows to this Court:

(1.)

That, at and long before the ratification and publication of the Treaty of Guadalupe-Hidalgo, in the month of July, in the year 1848, by and between the respective national governments of the United States of America and the Republic of Mexico, said The City of Monterey was known as, and was in fact, a Spanish or Mexican Pueblo, created as such by special grant originally of the Spanish sovereign authority;

That, for many years previous to the acquisition of the territory of "Upper California" by the United States of America, it was the Mexican capital and the seat of the civil and military government of the several territories now comprising said State of California;

That, it was incorporated as a city by a decree of the Spanish cortes on the 23rd of June, in the year 1813,—it having been first settled or colonized by the Spanish missionary priest, Junipero Serra, in 1770;

That, it has since been recognized repeatedly by the supreme court and the legislature of said State of California, as having been such Spanish or Mexican "Pueblo," and as having had all the rights, privileges and immunities thereunto appertaining and belonging;

149 (2.)

That, the present State of California, aforesaid, was, previous to and at the time of the ratification and publication of said treaty, but a subordinate province of the domain belonging to the Republic of Mexico, and received no special recognition, whatever, as such province under or in said international treaty; that, as said province only did it come within the jurisdiction of the said United States of America, solely by virtue of military conquest and pecuniary purchase, and was subject, like all the rest of the ceded territory of Mexico, to the provisions of said treaty and the laws of the Congress of the United States of America enacted in conformity therewith, as well as to the Constitution of the United States of America; and attention is herewith respectfully called to Articles VIII and IX of said Treaty:

(3.)

That, for a succinct and somewhat elaborate digest of the derivation, nature, rights and immunities of "pueblos," in general, under Spanish and Mexican jurisdictions and the public lands granted them by the sovereign powers under which they were created into corporate life, attention is respectfully asked to an examination of the Briefs of the very numerous and able Counsel and to the extended opinion of the Supreme Court of said State of California, in the noted and early case of "Hart *vs.* Burnett," 15 Cal. pp. 537-634,—in which, among other learned statements, that Court says in brief: "And when Pueblos were established they became invested, even without any formal assignment, with a certain title to the Pueblo Lands. This title was recognized by the Act of March 3, 1851, as in the nature of a grant, and it has ever since been upheld and protected by the decisions of this Court and of the Supreme Court of the United States." (*Grisar vs. McDowell*, 6 Wall. 363, is cited.)

(4.)

That, the Spanish laws give different names to respective portions of land within the limits of a city, pueblo, or town, according to the various uses to which they are applied. Thus, there are "solares,"
150 or house-lots of a small size, upon which dwellings, shops, stores, etc., are to be built. There are "suertes," or sowing-grounds, of a larger size, for cultivating or planting, as gardens, vineyards, orchards, etc. There are "ejidos," which are quite well described by the English word, "commons," and are lands used in common by the inhabitants of the place for pasture, wood, threshing-ground, etc.; and particular names are assigned to each, according to its particular use. Sometimes additional "ejidos" were allowed to be taken outside of the town limits. There are "propios," or municipal lands, from which revenues are derived to defray the expenses of municipal administration. There were also other names, such as "terminos," "concejiles," "tierras comunes," "tierras de labor," "tierras de regadio," "abrevaderos," "dehesas," "pastos," "montes," "plazas," etc., etc.; that, the right of municipal authorities

of pueblos to make grants or "distributions," in "solares" and "suertes," only to individuals and settlers within the limits of such pueblos, seems to have been conferred in very early times, and is very often referred to in the more recent laws and orders as a subsisting right. But certain classes of such lands, as *"ejidos,"* etc., could not, in general, be so granted or distributed to individuals for their exclusive use or occupation. Sometimes, municipal officers were prohibited from making grants or distributions of any town lands of any class or description without the royal license; and at others, special officers were appointed by the Crown for that purpose; that, of the several kinds of pueblo lands held by said City of Monterey were those known as "solares," "suertes," "ejidos" and "propios:"

(5.)

That, the Congress of the United States of America, in conformity with said treaty, aforesaid, enacted on March 3rd. 1851, an Act entitled,—*"And Act to Ascertain and Settle the Private Land Claims in the State of California,"*—the object, end and scope of which was to create a special judicial tribunal, *sui generis* in character, (Vide, "U. S. *vs.* Flint," 4 Sawyer 42) of The United States of America, to be composed of three bodies, to-wit, a Board of United States Commissioners, consisting of three members, nominated by the President and confirmed by the Senate of the United States
151 of America,—together with two adjunct and appellate United States Courts, to-wit,—The United States District Court for the Southern District of California, and from it, as the last appellate court, the Supreme Court of the United States of America,—for the specified purposes of examining into the questions of the validity of titles to Mexican land grant "claims" to lands within the limits of the State of California; to adjudicate by final decrees upon the same; to approve the adjustment of boundaries of the same by the United States Surveyor-General for California; and thereafter, and only then, the United States of America, in its own proper time,—and not the State of California,—was to issue its Letters-Patent for said approved and confirmed "claims" for said lands:

(6.)

That, *the fourteenth section* of said last named Act of Congress, reads as follows, to-wit: "The provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under any grant from any corporation or town to which land may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, 1846; but the claim for the same shall be presented by the corporate authorities of the said town; or where the land on which said city, town, or village, was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh of July, shall be *prima facie* evidence of a grant to such corporation,

or to the individual under whom the said lot-holders claim; and where any city, town, or village, shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of said city, town, or village.": that, therein and thereby, the congress of the Unied States of America exercised the national sovereign prerogative of jurisdiction upon and over such "pueblo lands," ceded under and
152 by virtue of said treaty, thus distinctly and positively assuming thereby a presumptive and contingent title in fee in and to them, if the "claim" should not be presented for "confirmation" by said federal special tribunal:

(7.)

That, in conformity with said "section fourteen," aforesaid, the corporate authorities of said City of Monterey did, thr-u- one, D. R. Ashley, as attorney in that behalf, on March 2nd, 1853, present before said board of United States Commissioners, for the purpose of allowance and confirmation, a petition for "the claim" of said City in and to the "Pueblo lands" granted the "Pueblo of Monterey," as aforesaid, by the Spanish Government many years previously,—and which original grant had mysteriously disappeared, as stated in said petition,—and which were held by said "Pueblo" as such at the ratification and publication of said treaty, aforesaid, for the public purposes and uses stated in said grant, and as defined in the Mexican Laws on the subject; that said petition for said "claim" was duly allowed and the same was confirmed by said Board of United States Commissioners, on the 22nd day of January, 1856, as follows:—

"Opinion of the Board of Commissioners to Ascertain and Settle Private Land Claims.

THE CITY OF MONTEREY
vs.
THE UNITED STATES.

For Pueblo Lands.

The present City of Monterey was organized at an early day, and as a Pueblo and afterwards was recognized by the Mexican law as a City and became the Capital of California, and at the time of the conquest of the country was the seat of the political Government.

The documentary evidence in the case shows that on the 24th day of July, 1830, the common lands of the Pueblo previously assigned were approved by the territorial deputation with clearly defined limits and boundaries, which lands have ever since, according to the testimony, been reputed and recognized as the lands of the corporation.

In the proceedings before the deputation it was suggested that two Ranchos which were situated near the town should be excluded from

the assignment of the pueblo lands; and in the petition to
153 this Commission it is stated that certain individuals had acquired rights to some portions of the land, included within the boundaries and they propose to exclude these from the decree of confirmation.

The right of the city to the premises seems to be fully established, and we shall confirm to the corporation the area within the limits defined by the decree of the deputation, excepting such portions thereof as are held by individual owners by right of title derived from competent authority other than said Pueblo or city.

Confirmed."

Opinion of the Board, delivered by Commissioner Alpheus Felch. Filed in Office, January 22, 1856. Recorded in 3 Vol. Decisions, E. & D. & G. p. 379.

(Sig.) GEO. FISHER, *Sec'y.*"

(8.)

That, the full description of said Pueblo lands of the City of Monterey, aforesaid, is given in said petition for confirmation, as presented by said attorney D. R. Ashley, and is recorded in Vol. 2nd of Petitions, on pages 107, 108, 109, and a copy of which is now on file in the Clerk's Office of the U. S. District Court for the Northern District of California, to which, for fuller particulars, reference is hereby made: that, it will suffice herein to state that said petition declares.—"That for many years previous to the acquisition of California by the United States it (said City of Monterey) was the Mexican Capital and the seat of the Civil and Military Government of the Territories now comprising this State. And it was incorporated by a decree of the Cortes on the 23rd. of June, 1813, and that the grant of land which was made to it was all the land within the following boundaries"—(here follows a detailed description of said lands); "that such boundaries were expessly conceded, ratified and confirmed unto the said corporation of Monterey on the 24th of July in the year 1830 by the Mexican departmental legislature of the country in conformity with the laws of the Mexican nation and that all the claims and rights of property acquired by the said corporation under the Mexican Government have under the laws of this State become vested in the said city of Monterey and
154 that the said tract of land was granted and conceded to the said city of Monterey under the authority and in accordance with the laws, usages and customs of the Government of Mexico then in force over the Territory:" * * * "that the grant itself which was made to the said corporation is lost, but that proof of its confirmation and that the limits of the said grant was fixed as aforesaid is contained in, viz: The records of Journals of the Mexican Departmental Assembly of California for the year 1830:" * * * "and the original book now in the hands of the Surveyor-General of the U. S. for California for the 23rd and 24th days of July in that year."

(9.)

That, the formal "decree of confirmation" by said Board of United States Commissioners, was in brief, as follows:—

"The City of Monterey
vs.
The United States.

In this case, on hearing the proof and allegations, it is adjudged by the Commissioners that the claim of the said petition is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in the County of Monterey and known as the Pueblo lands of the city of Monterey, and is bounded and described as follows, to-wit: From the mouth of the River of Monterey in the Sea to the Pilarcitos; thence running all along the *canada* to the *Laguna Seca*, which is on the highroad to the Presidio; thence running along the highest ridge of the mountains situated towards the Mission of San Carlos unto Point Cypress further to the North; and from said point following all the Coast unto the said mouth of the River of Monterey; excepting and reserving therefrom such portions thereof as are held by individual owners by right or title derived from competent authority other than said Pueblo or city.

(Signed) ALPHEUS FELCH.
(Signed) R. AUG. THOMPSON.
(Signed) S. B. FARNELL."

(10.)

155 That, on the 5th day of January, 1857,—(some seven years after the admission of California as a state in the federal union)—the United States District Attorney, Pacificus Ord, filed a petition for review, in said U. S. District Court for the Southern District of California, in said case, in the concluding part of which petition, before the prayer for relief, occurs the following language, to-wit:—

"And the said claimant, having no valid right or title derived from the Spanish or Mexican Governments, to the land claimed as aforesaid, the lawful right and title in and to the said land was acquired by, and it now belongs to the United States, by virtue of conquest, and the treaty of peace, friendship, limits and settlement between the United States and the Republic of Mexico, made at the City of Guadalupe Hidalgo, February 2d, A. D. 1848."; that, said view of said U. S. Official as to the fee of said Mexican Land Grants being vested in the government of the United States of America, on and subsequent to the ratification and publication of said treaty of Guadalupe-Hidalgo, and until the issuing of a patent by it for the same, was itself confirmed in the announced and published opinion of this Court in the case of "*Meader vs. Norton*," 11 Wall. p. 455; December Term, 1870,—and said decision, to the knowledge of petitioner, has not been reversed or declared not good law in any subsequent case heard.

(11.)

That, on the 16th day of June, 1858,—(eight years after the admission of California as a state in the federal union)—the appeal taken by the said U. S. District Attorney in said case, to the said District Court, was abandoned in accordance with "the letter of the U. S. Attorney-General being shown to that effect,"—and the decree of the Board of United States Commissioners stood as final and confirmed; that, therefore, the question of title to said pueblo lands of the City of Monterey being then vested in the United States of America, as claimed, was not passed upon by either of the appellate judicial tribunals, as provided for in the said act creating said special court to hear and determine such cases, and never has yet been brought directly to this Court heretofore:

156 (12.)

That, the matter of title, therefore, at the respective dates, to-wit,—January 22nd. 1856, up to June 16th. 1858, at which latter date said decree was confirmed by said U. S. District Court, stood in this condition, to-wit, the pueblo lands of the city of Monterey were "confirmed" as to title in said city as the successor of "the pueblo of Monterey," by two of the only judicial tribunals authorized to hear and determine the matter, in accordance with said act of March 3, 1851, of the Congress of the United States of America:
acres.

(13.)

That, in accordance with the opinion rendered by this court, in the December Term of the year, 1870, in the said case of "Meader *vs.* Norton," 11 Wall. p. 455, to-wit,—"until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee,"—the said Federal Government,—"the United States of America,"—issued its "patent" for said "pueblo lands of the city of Monterey," to the said "The City of Monterey," on the "nineteenth day of November, in the year of our Lord, one thousand eight hundred and ninety one,"—signed by "Benjamin Harrison, President;" that, in said patent is contained a full recital of all proceedings had in, by and before said judicial tribunals,—(to quote) "whereby the proceedings of court upon *title* became final,"—together with complete detailed descriptions of the several four tracts of pueblo lands, embracing twenty-nine thousand, six hundred and ninety-eight, and fifty-three one hundredths—(29,698,53/100)—acres,—also, the official survey of plat of same and notices of publication; said survey and plat not having been approved by the United States Surveyor-General until the fifth day of January, 1869,—(ten years after the purported sale of said pueblo lands to said D. R. Ashley and said David Jacks, as hereinafter set forth, and over Twenty-Two years before said patent therefor was issued to said "City of Monterey" as aforesaid:

(14.)

That, the act of Congress admitting the State of California into the Union of States composing the Sovereign Federal Government of the United States of America,—one of the two parties participant in said Treaty of Guadalupe-Hidalgo,—as approved and signed by President Fillmore on the ninth day September, 1850, and said State has remained as a subordinate tegral part of such federal government, as such state, up to the esent time; that, at an early date after its incorporation as such State" in the supreme government of the said The United States of merica, in accordance with the Constitution—the basic law—of e latter,—(Article VI.)—which, together with all laws enacted the congress thereof, "in pursuance thereof," and "all treaties ade" * * * "under the authority of the United States,"—hall be the supreme law of the land; and the judges in every State all be bound thereby, anything in the constitution or laws of any ate to the contrary notwithstanding,"—said State of California, ru the legislative, judicial and executive branches of its governent, began and continued for many years thereafter, a system of nconstitutional and unwarranted assumption of jurisdiction in and er the vested fiduciary rights of said City of Monterey in and to id pueblo lands, and of sole sovereignty, as such state, as the aimed immediate successor to the National Mexican Government ereto, upon the cession by said government, of the territories emacing that part of the latter's domain known as "Upper California," nd now, as said State of California, to said United States of America, lminating in the "final judgment or decree" from which this apeal is taken:

(15.)

That, the legislature of said state of California enacted several ws in regard to the incorporation of said pueblo or City of Monrey into a state municipal corporation, the first being approved arch 30, 1850; the next, May 11, 1853; these were followed by nendatory acts, approved, March 4th, 1857, April 16th, 1862, pril 2nd, 1866, and March 16th, 1889; the last act repealed all the e preceding acts, but subsequently said City of Monterey was duly corporated under a general state law; that, said first mentioned act March 30, 1850) was the first general enabling act for the incorration of cities; that, said act of May 11, 1853,—enacted two months after said D. R. Ashley had filed said petition for confirmation)—provides in section five, as follows:—

"The Trustees shall also have power, to lease portions of e city lands for terms of one year, the city receiving the rents erefor." Section six, provides that,—"When it shall be necessary raise money for the purpose stated in the preceding section, the rustees shall have power to sell portions of the city property to the nount required to be raised and expenses of sale, and no more, and y further sale shall be invalid and null: such sales shall be at blic auction in the City of Monterey, after ten days' public notice, nd at such sale any of the Trustees shall have power to act as

auctioneers," etc.; that, section one of said act of March 4th, 1857, after granting other powers to said city trustees, amending section 7, of said act of May 11, 1853, incorporating said city, contains this language, to-wit:—

"The trustees may also pay for the expenses of prosecuting the title of the city, before the United States land commissioners and before the United States courts, and for that purpose, may sell and transfer any property, right or franchise, upon such terms and for such price as may by them be deemed reasonable;"

(16.)

That, the "prosecuting the title of the city before the United States Land Commissioners and before the United States Courts," was begun by said D. R. Ashley, as such attorney, on March second, 1853, and the same was confirmed on January twenty-second, 1856, by said Board, and finally confirmed by decree of the U. S. District Court for the Southern District of California, as aforesaid, on June sixteenth, 1858; that, thus, the matter of "title" was pending before the United States judicial tribunals, duly authorized to try and determine the same by the United States of America,—one of the two sole sovereign powers engaged and concerned in said Treaty of Guadalupe-Hidalgo,—for a period of five years, three and one-half months, and said "title" was concededly, by such judicial proceedings, vested continuously in the government of the United States of America, on and from the cession of said conquered terri-
159 tory of Mexico,—the other sovereign power concerned,—and also in accordance with said decision in the case of "Meader *vs.* Norton," *supra*, "the fee" of said "Mexican Land Grant," said "pueblo lands of the City of Monterey," remained in the said United States of America,—to adopt the words of that decision,—"until the patent issues; but when it issues the legal title passes to the patentee,"—which latter came to pass on "the nineteenth day of November, in the year of our Lord, One Thousand, Eight Hundred and Ninety-one," as aforesaid:

(17.)

That, in conformity with sections 5 & 6 of the act of May 11, 1853, and section 1, of the act of March 4, 1857, aforesaid, of said State Legislature, said D. R. Ashley, attorney for said city as aforesaid, presented his bill for professional services so rendered, amounting to the sum of Seven Hundred and Fifty Dollars, ($750.00), to the alleged Trustees of the City of Monterey, which bill was duly allowed and approved by them,—but there being no money or funds in the possession of the Treasurer of said City, the matter of said claim for professional services so rendered and allowed, was permitted to rest in *statu quo*, until on the twenty-fifth day of January, 1859, said alleged Board of Trustees issued and published the following notice of auction sale, to-wit:—

"*Auction Sale.*

On the ninth day of February, A. D. 1859, between the hours of 9 o'clock A. M. and five o'clock P. M. at the County Court House door in the City of Monterey, there will be sold for cash at public auction to the highest bidder, to pay certain indebtedness now outstanding against the City of Monterey, the following described property, or so much thereof as may be necessary to pay the same. To-wit:—The lands belonging to the City of Monterey, granted by the Mexican Government, or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the U. S. Land Commissioners for California, to said city, including and comprising all right, title and interest which said city has or may have, in possession or expectancy in, and to the lands and every part and portion thereof bounded as follows:

Commencing at the mouth of the Salinas or Monterey
160 River, and running up that stream to the site of the "Pilarcitos," thence through the canon to the "Laguno Seco," Thence following the summit of the hills and the city line between Carmel to Point Cypress; thence following the Pacific Ocean to the place of beginning.

By order of the Board of Trustees of the City of Monterey.

(Signed) J. D. CALLAGHAN,
Clerk of said Board.

Dated, City of Monterey, January 25, A. D. 1859.

(18.)

That, presumably, for the purposes of this petition, said "sale" of said Pueblo lands of the City of Monterey was duly made in accordance with said published notice, by said alleged trustees, and the sole bidders and purchasers thereat and thereof were the said D. R. Ashley, aforesaid, together with one, David Jacks, jointly, and whose joint highest bid for said pueblo lands,—containing in the four tracts thereof 29,698.53/100 acres,—was the munificent sum of nine hundred and ninety-one dollars, and fifty cents,—($991.50.)—that being the amount of said Ashley's claim for professional services, as aforesaid, with interest thereon ,—and for which amount said alleged Trustees, named Phillips, Callaghan and Osio,—without any other authority than that contained in said acts aforesaid of the State Legislature of California, as hereinbefore given,—did, thereupon and of that date, to-wit,—February nine, 1859,—execute a deed, as such trustees—(quoted) "of said City in their official capacity and thereby duly authorized by virtue of their office as said Trustees," of "all the right, title and interest of the City of Monterey, in and to" said Pueblo lands aforesaid, to said D. R. Ashley and said David Jacks; that, at this time according to the ruling of this Court in said case of "Meader-vs-Norton," supra, "the fee" of said Pueblo lands was in the United States of America, and the United States survey of the same had not been made and approved, as required in said act of the United States Congress, approved March 3, 1851, entitled as afore-

said,—"An act to ascertain and settle the private land claims in the State of California," and said survey was not so approved until the fifth day of January, 1869, almost ten years after the execution and delivery of said alleged deed:

161 (19.)

That, said deed, in its premises, recites the fact of the "party of the first part" and said City of Monterey's indebtedness to said (quoted) "D. R. Ashley, in the sum of nine hundred and ninety-one and one-half dollars for expenses of prosecuting the title to lands of the said City before the Board of United States Land Commissioners and before the United States Courts;" of there being no money in the treasury to pay said indebtedness,—(quoted)—"and therefore under order and ordinance of said Board of Trustees, after due notice for two weeks given by publication of the same in the newspaper called the Pacific Sentinel and by posting up notices of the sale in the English and Spanish language in at least three of the most public places in said City of Monterey, there was, on this ninth day of February, A. D. 1859, sold to said parties of the second part, for the purpose of paying the indebtedness aforesaid of said city, the lands and premises in his Conveyance hereinafter described and set forth;" * * * "and said hereinafter described lands were struck off and sold to said parties of the second part for the sum of one thousand two and one-half dollars, being the amount of the aforesaid indebtedness and the necessary expenses of sale;" * * * "no person or bidder was willing or offered to take and buy less than all the lands and premises hereinafter described, and said sum so bid is not more than is absolutely necessary to pay the said indebtedness of said city and the expenses of sale;" * * * (still quoting) "said party of the first part has granted, bargained and sold and by these presents does grant, bargain, and sell, quitclaim and convey unto said parties of the second part and their heirs and assigns in fee simple absolute all the lands situate, and being in the State of California and County of Monterey and described as follows, to-wit:—

The lands belonging to the City of Monterey, granted by the Mexican Government to, or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the United States Land Commissioners for California to said city; including and comprising all the right, title and interest which said city has or may have, whether in possession or in expectancy, in and to the lands, and every part and portion thereof, bounded as follows."—

162 (then follows a description in detail of the boundaries, unnecessary to give herein.); * * * (still quoting) "containing all the lands by the authorities of the United States confirmed to said City of Monterey;" then, the *habendum et tenendum* clause, with the execution thereof, and an "N. B." to the effect that the words "one thousand two" were erased, and those of "nine hundred and ninety-one," interlined in lieu thereof before execution of said deed,—which is signed and acknowledged by "John Burke Phillips, President; Salvador Osio, Treasurer; John D. Callaghan, Clerk," with their purported seals affixed thereto:

(20.)

That, thus was "sold" to said D. R. Ashley and said David Jacks, aforesaid, under and by virtue of a State statute, 29,698,53/100 acres of unsurveyed and unpatented "pueblo lands,"—"the fee' of which was at the very time vested in the sovereign Government of the United States of America gained by conquest and purchase as the victorious nation, and ceded to it as such by said Treaty of Guadalupe-Hidalgo: "sold" for the paltry sum of nine hundred and ninety-one dollars and fifty cents; "sold" for a questionable attorney's fee for professional services rendered!—the whole of the princely estate which he was engaged to secure for his client as its attorney,—the price paid by this precious brace of land-pirates, for the same, being valued at—not quite a letter-postage stamp per acre!!—lands that today are worth in the open market the sum of between three and five millions of dollars!!!

(21.)

That, on the fourteenth day of September, 1868,—(before said United States Survey had been approved,)—said D. R. Ashley, aforesaid, sold all his joint interest in and to said pueblo lands of the city of Monterey, to said David Jacks, aforesaid: that, said Jacks is still alive and residing,—owing to the inscrutible ways of divine providence,—in said City of Monterey, where he has made his home since the year, 1850, and whose character needs no further delineation herein; that, said "ejidos" and "propios" of said pueblo lands are still in their primevil condition as when the pretended pur-
163 chase and sale thereof occurred on Feruary 9, 1859; are without improvements; and such illegal possession by said David Jacks, has resulted in a practical paralysis, if not complete strangulation of material growth and progress of said City of Monterey, and but for it, as the result of such illegal sale aforesaid, said city would, today, be second to no seaport on the Pacific Coast, endowed as it is with natural advantages of sea-harbor and surrounding agricultural country that only needs the breaking by law of the "strangle-hold" said Jacks still retains upon it, to develope its marvelous and unsurpassed advantages:

(22.)

That, said Ashley had, a few years previous to his said sale to said Jacks,—according to petitioner's best knowledge and belief,—been a member of the Legislature of said State of California, and as such, had secured the passage of a certain act, prepared and introduced by him, which was approved on the second day of April, 1866, and reads as follows:—

"An Act to Further Amend an Act to Incorporate the City of Monterey, Approved May Eleventh, Eighteen Hundred and Fifty-three, as Amended March Fourth, Eighteen Hundred and Fifty-seven.

The people of the State of California, represented in senate and assembly, do enact as follows:

"SEC. 2. All sales and conveyances made by the corporate authorities of said city since the eighth day of February, A. D. eighteen hundred and fifty-nine, and which conveyances purport to have been recorded in the county recorder's office of Monterey county, purporting to convey public lands or lands confirmed to said city of Monterey in pursuance of the act of Congress of March 3, A. D. eighteen hundred and fifty-one, entitled an act to ascertain and settle the private land claims in the State of California, *are hereby ratified and confirmed.*

"SEC. 3. This Act shall take effect immediately;"

164 (23.)

That, by said last quoted Act of the state legislature of California and in virtue thereof, it was claimed by said David Jacks, said grantee of said D. R. Ashley, and the respondent in said suit aforesaid, as also, the present illegal possessor of said pueblo lands, that the so-called "sale" to said Ashley and himself, jointly, was thereby legally and constitutionally confirmed and ratified, and "the fee" therein was validated in him, by the only sovereign authority having sole jurisdiction in, of, over, and upon said "pueblo lands of the city of Monterey," unsurveyed and unpatented, as aforesaid,—"the fee" therein vesting theretofore in the sovereign state of California, instead of in the United States of America:

(24.)

That, although said David Jacks had been the pretended *bona fide* owner, or one of the two joint owners, of said pueblo lands, with the "fee" vested in him, as claimed, from the date of said "sale," so-called, on the ninth of February, 1859, he did not, according to his sworn testimony in said case of "The City of Monterey—*vs.*—David Jacks," begin to pay taxes thereon until eighteen years thereafter, to-wit, the year "1877," and never afterward, as a matter of record,—as petitioner is informed and believes,—contested the issuance of a patent therefor to said City of Monterey, or made any effort to secure the patent therefor to himself, as a substituted "Claimant," as he had done in other "Mexican Land Grant" cases, notably the "Rancho el Pescadero," now pending before this Court:

(25.)

That, on the 23rd. day of June, 1865, the following entry was made in the book of minutes of the Board of Trustees of said City of Monterey:—

"At a meeting of the Board of Trustees of the City of Monterey, at Dr. Canfield's office, June 23, 1865, there being present a full Board, a preliminary examination into the state of the affairs of the City was made: And it appearing that the sale of the city lands to D. Jacks and D. R. Ashley, on Feb. 9, 1859, was unauthorized and illegal; it was ordered that David Jacks and others be notified by the Clerk that the Board is ready to receive any propositions
165 from him or them to negotiate with the City for the relinquishment by Jacks and others of any and all claims that he

or they may have to city lands or other property of the City of Monterey, and for general settlement of accounts between the parties mentioned and the City.

(Signed) MANL DIAZ, *President*,
(Signed) C. A. CANFIELD, *Clerk*."

that, said Jacks made no direct response whatever to said repudiation and invitation by said Board of Trustees: the said *Act of April 3, 1866*, being the indirect one:

(26.)

Your petitioner further shows: That, the preceding somewhat extended but necessary preliminary statements of recorded facts are essential to what hereinafter follows, for a complete comprehension of the legal and constitutional questions to be directly presented:

(27.)

That, said United States letters-patent aforesaid, containing the usual "*stipulation*" therein,—(Ex. "C") was issued by said supreme sovereign, federal government—"the United States of America"—to said City of Monterey,—successor of said "Pueblo of Monterey"—for all said pueblo lands, on the said nineteenth day of November, in the year, 1891, as aforesaid, and that exactly one month thereafter, to wit,—December nineteenth, 1891, said City of Monterey, as Plaintiff, by one Robert S. Forbes,—not a licensed practitioner of law,—as its attorney of record, brought a suit at law against said David Jacks *et al.* (No. 1850), in "the superior court of the county of Monterey," in said State of California, for ouster and possession of, and to quiet title to 1,635, 3/100ths acres of said pueblo lands,—in which suit, said Jacks appeared and answered by attorneys; that, on November seventeenth, 1896, said City of Monterey, as plaintiff, by the same attorney of record, brought another similar suit against said David Jacks *et al.*, in the same court (No. 2762), to quiet title to the several tracts of pueblo lands as described in said Patent therefor, and containing respectively—"tract No. one,"—27,936, 64/100ths acres,—"tract No. two,"—(not numbered),—"tract No. three,"—110, 91/100ths acres,—"tract No. four," 15, 96/100ths acres,—making a total acreage of 29,698, 53/100ths acres:
166 to which said suit, said Jacks also appeared therein by attorneys and answered; that, in both answers in said suits, said Jacks pleaded the non-incorporation of said city of Monterey and his adverse possession under the State statute,—he well-knowing that "the fee" of said pueblo lands at that time was vested in the government of the United States of America, as aforesaid, and never having had the presumption to apply in person in the U. S. District Court for the Southern District of California for substitution of himself as "Claimant" for said patent for said pueblo lands, as he had done in the case of the "claim" for said "Rancho El Pescadero:"

(28.)

That, both said suits at law were consolidated into one, and were

tried, without a jury; the judge of said state court, on the 27th day of September, 1899, filed in court the following brief—

"Findings of Fact and Conclusions of Law;"

(Superior Court, Nos. 1850 and 2762.)

"This cause having heretofore been tried, argued and submitted, the Court, now being fully advised finds and decides:—

(1.) That the plaintiff is a municipal corporation incorporated subsequently to March 16, 1889, and prior to the commencement of this action.

(2.) That the plaintiff was not, at or prior to the commencement of this action, the owner, nor entitled to the possession of any part of the land described in its complaint, but on the contrary the defendant David Jacks was, at the filing of such complaint and still is, in the possession of said land and the owner of the whole thereof.

(3.) That the plaintiff's cause of action is not barred by the provisions of sections 318 and 319 of the Code of Civil Procedure of said State, or either of them, nor otherwise.

As conclusions of law the court finds that, the plaintiff is not entitled to any relief herein, and that the defendant David Jacks is entitled to judgment that he go hence without day and that he recover his costs of suit herein expended. Let judgment be entered accordingly.

(Signed) N. A. DORN,
Judge of the Superior Court."

(Final Decree followed:)

167 (29.)

That, motion was made by plaintiff in said consolidated suit for a new trial, and denied; whereupon notice of appeal was filed and entered by said Forbes as attorney of record, thru Messrs Pringle & Pringle, Mastick, Van Fleet & Mastick, as of Counsel, to the Supreme Court of the State of California; that, Messrs. Freeman & Bates, and D. M. Delmas appeared as of Counsel of record for said defendant David Jacks; that, said "plaintiff's bill of exceptions on motion for new trial and on appeal," was based upon the following specified documents used in said trial,—petition of the City of Monterey to Board of United States Commissioners to ascertain and settle private land claims in the State of California; proceedings of the territorial deputation setting apart the pueblo lands to the City of Monterey; opinion of the said Board of United States Commissioners; notice of appeal by the United States Government to the U. S. District Court for the Southern District of California from said decree of confirmation; abandonment of said appeal, with leave by the Court to proceed under said decree as upon a final decree and said Patent aforesaid;—all of which documents have been hereinbefore given in part, and which are contained in the printed records of said case,—a copy of which accompanies this petition.

(30.)

Your petitioner further shows;—that, said case of "The City of Monterey *vs.* David Jacks" was fully argued and heard before said Supreme Court of the State of California,—Messrs Pringle & Pringle, Mastick, Van Fleet & Mastick appearing for and in behalf of said City, and Mr. John Flournoy, for and in behalf of said Jacks,—and on the eleventh day of July, 1903, Mr. Justice Lorigan rendered the "final judgment or decree" of said Supreme Court of the State of California,—three of the other six Justices dissenting therefrom in a motion for rehearing,—which said "final judgment or decree" appears in full on pages 542 to 559, inclusive, of Volume 139, California Reports,—confirming said final decree of said Superior Court, and denying a rehearing in said Supreme Court of the State of California.

168 (31.)

That, in order to be accurate in the statements of law as presented by said Supreme Court of the State of California, in said "final judgment or decree" in said cases, aforesaid, petitioner will be pardoned for embodying herein a very few but very pertinent extracts from the opinion therein as given by the said Mr. Justice Lorigan, and by virtue of which the said combined actions come within the provisions of Section 709, United States Revised Statutes, as amended in 1875, and is, therfore, brought before this Court on appeal for re-examination and reversal, it is prayed, in accordance therewith, and, also, Sections 1003 & 1008, of said statutes:

(32.)

That, the paragraphs in said "final judgment" to which reference is made, to which this Court's particular attention is prayed, are the following enunciations of—it is believed—untenable and unconstitutional law, conflicting with the Constitution of the United States of America, Article VI; with the said Act of Congress of March 3, 1851, aforesaid; and with the rights guaranteed under said treaty of Guadalupe-Hidalgo; to wit:

"(S. F. Nos. 2349, 2350. In Bank. July 11, 1903.)"

"THE CITY OF MONTEREY, Appellant,
versus
"DAVID JACKS, Respondent.

'Actions to Quiet Title.

* * * "The case of Redding *vs.* White, 27 Cal. 282, determines "solely the question of the power of the pueblo under the Mexican "law to deal with its lands. The grant there involved was one made "by the alcalde under the Mexican law. The point of legislative "control over pueblo lands was not, and could not be there involved. "* * * "There is a marked difference however, between lands

"which are held by a municipality in trust for public purposes, such "as pueblo lands, and lands acquired by a municipality through "purchase or special grant, and held in proprietary right.

"And if this distinction is kept in mind, it obviates all
169 "difficulty in determining when the legislature has absolute "control and when it has no control."

Again: "* * * the case of Grogan *vs.* San Francisco, 18 Cal. "515, clearly points out the marked difference between the control "the legislature has over land held in trust by the City for general "municipal purposes, such as pueblo lands, and its control over land "acquired by the City for municipal uses by special grant or pur- "chase, and held in proprietary right."

Citing the following cases decided in his own Court, to-wit,— "San Francisco *vs.* Beidman, 17 Cal. 462," "Thompson *vs.* Thompson, 52 Cal. 157," "Gordon *vs.* City of Sandiego, 101 Cal. 522," "Oakland *vs.* Oakland Water Front Co. 118 Cal. 194,"—*the highest court of*—"the State of California, continues as follows:

"We are satisfied from the above authorities that while under the "Mexican law the officers of a pueblo were empowered to make grants "of the pueblo lands, yet the pueblo had no indefeasible proprietary "interest in them; that they were *in trust for public and municipal "purposes, subject to the control and disposition of the Mexican "Government; that upon the establishment of our State government "it succeeded to the same sovereignty over them as was exercised "by the former government, and that their control and disposition "came fully, entirely, and absolutely within the power of the legis- "lature as representing such covereignty.*

"And as the full and complete control of said lands was a matter "within the power of the legislature, it could have originally conferred "upon the trustees of the City of Monterey (if under the act it did "not) the right *to dispose of them.* We think also that there is no "doubt that the legislature had the power to confirm the deed in ques- "tion, and that the act in question here operated to effect that pur- "pose."

Continuing the said Justice Lorigan, says:

"Pueblos under the Mexican law were simply part of the political "government of the country, and as political agencies the State "succeeded to *control* over them upon the change of government.

"Whatever property they had incidental to their existence as
170 "pueblos, was held as a municipal trust for *the public use* of "the pueblo. As such agencies, the State was under no obli- "gation to continue their existence. In the exercise of her sovereign "power she could have abolished them altogether, or have incor- "porated them anew into her own scheme of government as munici- "palities, with such powers and restrictions as she might see fit to "impose upon them.

"When incorporated by the legislature as municipalities under "our government, the new municipalities did not by the simple fact "of incorporation succeed to the rights and claims of their pueblo "predecessors to the pueblo lands.

"*The former Pueblo Trust, and the ownership of lands incident*

"to it had passed with the change of flags, and vested in the State of "California as succeeding sovereign.

"When the Pueblo was by the legislature incorporated into a "municipality, the act of incorporation was but the expression of "the sovereign will that, in the important business of good govern- "ment, a municipality should take the place of the former Pueblo, "modeled in such form and invested with such powers as the legis- "lature might determine.

"If the new municipality acquired control of the lands of the "former Pueblo (as was usually the case) it did so by express pro- "vision in the act of incorporation from the State, not by virtue of "any independent claim it could make as successor to the Pueblo, "because it was only successor by virtue of legislative grant.

"So in the case under consideration, the city of Monterey acquired "control over these lands not as an incident to its creation as suc- "cessor to the former Pueblo of Monterey, but by express concession "in the act of incorporation.

"It held them in trust for public municipal purposes as a chartered "agent of the State, and could only hold them under such conditions "and for such time as the State might permit.

"Its own existence as a municipal corporation depended upon the "will of the legislature, and the power which created it could at any "time repeal its charter and end its existence. Through
171 "such repeal the entire property held for public use,—*which "would include the Pueblo lands,*—would revert to the State, "and no limitation being imposed upon the legislature under the "constitution of 1849 in that respect, could be then disposed of in "any manner it saw fit." (It is respectfully asked, would not the carrying out of this doctrine, be State judicial robbery?)

Continuing, Mr. Justice Lorigan, of the "highest court of the State" of California,—"succeeding sovereign" to Mexico in its juris- diction over said "Pueblo lands of the city of Monterey," says:

"And it is difficult to understand why, as the State could acquire "this entire property through the repeal of the charter of the city of "Monterey, it did not have the power to give effect, by confirmatory "legislation, to the act of the city trustees in disposing of it." ("Hart *vs.* Burnett," 15 Cal. 624; "Meriwether *vs.* Barrett," 102 U. S. 511.)

This Court will please bear in mind that the State legislature of said "succeeding sovereign" State of California enacted said "con- firmatory legislation," aforesaid, on April second, in the year eight- een hundred and sixty-six, whereas, said patent for said Pueblo lands recites that—"the survey and plant was approved by the United States Surveyor-General, on the 5th day of January, 1869," nearly three years subsequent to the passage of said "confirmatory legislation," and in the year 1870, this court held in "Meader *vs.* Norton," *supra*, that "the fee" to all Mexican land grants in territory ceded by said Treaty aforesaid, vested thereby in the United States of America, until the patent therefor was issued,—"but when it issues the legal title passes to the patentee."

(33.)

And your petitioner further shows:—That, the "final judgment or decree" in said case of "the city of Monterey *vs.* David Jacks," by said "highest court of a State," to-wit,—the supreme court of the State of California,—was in contravention of the following sections in "the Civil Code of California," under the head of "trusts," to-wit: "Article 11. Sec. 2229;" (ditto) Sec. 2234; "Article 111. Sec. 2267" (Exhibit "A"); that, it was in consonace with a long
172 line of decisions theretofore rendered by said Supreme Court, from that of "Hart *vs.* Burnett"—(delivered in 1860)—inclusive, in which said Court, in brief, uses this language in connection with the advanced doctrine of State sovereignty over the matter of Pueblo lands, to-wit:—

"These municipal lands to which the city of San Francisco succeeded were held *in trust* for the *public uses* of that city. This "property and these trusts were public and municipal in their "nature, and were within the *control* and *supervision* of the State "sovereignty.

"The act of the legislature of March, 1858, (Stats. 1858, p. 52.) "confirming the so-called Van Ness Ordinance, was a legal and "proper exercise of this sovereign power: and this act gave full effect "to the provision of that ordinance, and vests in the possessors "therein described, as against said *city and State*.—a title to the "lands in said ordinance mentioned."—(The very learned Justice who rendered said Opinion, was careful to avoid including the United States of America, in which "the fee" at that time was vested.)

The same doctrine was affirmed in "Payne *vs.* Treadwell," 16 Cal. 233, wherein the court say:—"The property itself is a trust, and the "legislature is the prime and original controlling power managing "and directing the use, disposition, and direction of it. Otherwise, "the solecism would appear of a derivative power higher in degree "and different in kind from the source of its derivation."—And in "San Francisco *vs.* Canavan," 42 Cal. 552, said court say:—

"The nature of the title has been so often discussed and repeatedly "adjudicated *by this court* that it would now be a work of supererogation to undertake anew a critical analysis of it. It will be "sufficient to state generally that it has been established by those "decisions too firmly to be shaken or overthrown at this late day, "that neither the former pueblo, nor the city and county, as its "successor, ever held an infeasible proprietary interest in these "lands."

"On the contrary, they were and are held only *in trust for certain "municipal purposes*. Under the Mexican system, while the pueblo "might dispose of the lands, or use them in pursuance of the
173 "trust on which they were held, they were, nevertheless, sub- "ject to the disposition of the governor without the consent of "the municipal authorities." * * * "Whilst the Mexican "government exercised dominion over this territory, *it* had the "power to direct how *the trust* should be executed by the pueblo,

"and to enlarge or limit (?) its powers in respect to the disposition "of these lands: *And when California was erected into a State of "the American Union, it succeeded to the power which the govern-"ment of Mexico had before exercised over its municipalities.*"

(34.)

That, such was the official judicial opinion of said Supreme Court of the "succeeding sovereign" state of California, declared and published in the face of the decision of this court in the case of "Townsend *vs.* Greeley," 5 Wall. 336, wherein was used the following words:—

"By the laws of Mexico, in force AT THE DATE OF THE ACQUISI-"SION OF THE COUNTRY, *pueblos or towns were entitled, for their "benefit and the benefit of their inhabitants, to* THE USE *of lands,* "constituting the site of such pueblos and towns and of adjoining "lands *within certain prescribed limits. This right* appears to have "been common to the cities and towns of Spain from an early period "of her history, and was recognized in the laws and ordinances for "the settlement and government of her colonies on this continent."

"*Those laws and ordinances provided for the assignment to the "pueblos or towns, when once established and officially recognized, "for* THEIR USE *and the* USE *of their* INHABITANTS, *of four square "leagues of land.*"

(35.)

That, thus may be observed, from the aforesaid final judgments or decrees of said highest court in the State of California, the anomalous and exploded doctrine of "State sovereignty" carried to the extreme of "nullification," and to which may be justly applied the very words of said court, above quoted, to-wit,—"*Otherwise, the sole-"cism would appear of a derivative power higher in degree and "different in kind from the source of its derivation.*"—and which travesties upon the principle of sovereignty of both the two
174 and only national powers that enacted the said "treaty of Guadalupe-Hidalgo," and to one of which,—"The United States of America,"—said "state" owes its corporate existence as said "State of the American Union," and as a former part and portion of what had been the conquered and purchased territory of the other nation,—"the Republic of Mexico;" the United States of America, whose Congress enacted the law of March 3rd. 1851, hereinbefore referred to, creating said judicial tribunal to adjudicate upon the validity of titles to said Mexican Land Grants, and whose Supreme Court has decided that "the fee" in said land grants vested in the said The United States of America until the patent for the same shall have issued,—"and when it issues, the legal title "passes to the patentee."

It is respectfully asked, if the unhallowed doctrine of "nullification," thus galvanized by this latest caveat of "State Sovereignty," is to be endowed with the breath of life, and these state court decisions to be regarded as "*stare decisis,*" as against the Federal government, by the sovereign Nation's Supreme Judicial Tribunal,—"the Supreme Court of the United States of America."

(36.)

In conclusion, petitioner further shows:—that, in conformity with the provisions of said sections 709, 1003, and 1008 of U. S. Revised Statutes,—(as amended in 1875)—(Exhibit "B,") and by virtue of which this petition is here presented and proper proceedings prayed herein,—the following is a summary of legal and constitutional points "drawn in question" in said "final judgment or decree" rendered in said case of "The City of Monterey, Plaintiff and Appellant, *vs.* David Jacks, Defendant and Respondent," to wit:—

"(1.) The validity of a treaty of, a statute of, and an authority "exercised under the United States, and the decree is against their "validity,"—to-wit: Treaty of Guadalupe-Hidalgo; Act of March 3. 1851, and Meader *vs.* Norton, 11 Wall. U. S. p. 455–8:

"(2.) The validity of a statute of, and an authority exercised "under said state of California, on the ground of their being repug-
"nant to the Constitution, Treaty, and Law of the United
175 "States, and said decision was in favor of their validity,"—
to-wit: Act of April 2, 1866, of Legislature of State of California, confirming "sale" of said pueblo lands:

"(3.) A title, right, privilege and immunity are claimed under "the Constitution, and treaty, statute, commission held, and author-"ity exercised under the United States, and said decision is against "the title, right, privilege and immunity specially set up and "claimed by appellant, under such Constitution, Treaty, Statute, "Commission or Authority," to-wit: Title to the "Pueblo Lands of the City of Monterey, as Confirmed by the U. S. Commissioners and the U. S. District Court, and Patented by The United States of America to said City of Monterey, Plaintiff and Appellant; said title in "fee" vested in said United States of America on and from July fourth, 1848,—the date of the ratification and publication of said Treaty of Guadalupe-Hidalgo,—up to "the nineteenth day of November, in the year of our Lord, one thousand eight hundred and ninety-one,"—the latter being the date of the execution and issuance of said United States Letters-Patent for said "pueblo lands of the City of Monterey:"

(37.)

Petitioner is advised and believes,—That, the said "final judgment or decree" in said suit, by the said Supreme Court of the State of California, is erroneous in law and equity, contrary to the provisions of Article VI, of said United States Constitution, and that this Court should require said case of "the City of Monterey, Plaintiff and Appellant, vs. David Jacks, Defendant and Respondent," to be certified and sent to it for review and determination, under and in conformity with said sections 709, 1003 and 1008, of the U. S. Revised Statutes, as amended in 1875, as aforesaid,—the matter involved being "a final judgment or decree in a suit in the highest court of a state,"—to adopt the language of said section 709, aforesaid; that said appellant, "the City of Monterey," was denied a rehearing in said Supreme Court of California, as aforesaid, and therefore, avails

itself of the provisions of said sections of the Revised Statutes
176 aforesaid:

Wherefore, petitioner respectfully prays, that a writ of error,— in accordance with the provisions of said section 709 aforesaid,—may be issued out of and under the seal of this court, directed to the Supreme Court of the State of California, commanding said Court to certify and send to this Court on a day certain to be therein designated, the original printed records of said case, entitled "the City of Monterey, Plaintiff and Appellant, *vs.* David Jacks, Defendant and Respondent," or a true copy thereof, and all proceedings of said Supreme Court of the State of California, in said suit aforesaid, to the end that the said case may be re-examined, reviewed and determined by this Court as provided in said sections 709, 1003 and 1008, of said U. S. Revised Statutes, aforesaid, and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Acts, and that the said "final judgment or decree" of the said Supreme Court of the State of California, in said case, and every part thereof, may be reversed by this Court. And your Petitioner will ever pray, etc.

THE CITY OF MONTEREY,
by its Counsel, in fact and in law, Hamilton Gay Howard.

STATE OF CALIFORNIA, *County of Monterey, ss:*

Hamilton Gay Howard, being first duly sworn, says,—that he has read the foregoing petition by him subscribed, made in and on behalf of, and by authority of said City of Monterey, State of California, and knows the contents thereof, and that each and every of the matters and things therein stated are true except as to such matters and things therein as are upon information and belief, and as to those he believes it to be true.

HAMILTON GAY HOWARD.

Subscribed and sworn to before me, this 28th day of Dec. A. D. 1904.

[Seal Chas. M. Howard, Notary Public, Monterey Co., Cal.]

CHAS. M. HOWARD,
Notary Public in and for the County of Monterey, State of California.

177 Let the writ of error issue, as prayed in the foregoing petition.

A. B. BROWN,
Associate Justice.

March 1, 1905.

178 EXHIBIT A.

(Copies.)

Civil Code of California.

Trusts: Article 11.

"SECTION 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

"SECTION 2234. Every violation of the provisions of the preceding sections of this Article is a fraud against the beneficiary of the trust."

Trusts: Article 111.

"SECTION 2267. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal."

(In effect, April 5, 1880.)

179 Copies of Sections 709, 1003 and 1008, United States Revised Statutes.

"SECTION 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or

Where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or

Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error.

The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States.

The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the same to the Court from which it was removed by the writ."

* * * * * * *

"SECTION 1003. "Writs of error from the Supreme Court to a State Court, in cases authorized by law, shall be issued in the same

manner, and under the same regulations and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

* * * * * * *

"SECTION 1008. "No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in — Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."—(Act, June 1st, 1872, c. 255, Sec. 2, 17 Stat. 196.)

EXHIBIT "C."

"But with the stipulation, that in virtue of the fifteenth section of the said Act, neither the confirmation of this claim, nor this patent shall affect the interest of third persons."

180 [Endorsed:] In the Supreme Court of the United States of America: October Term, 1904. The City of Monterey, Plaintiff & Appellant, *vs.* David Jacks, Defendant & Respondent. *Ex-Parte:* Petition of appellent, for writ of error to the supreme court of the State of California. ("S. F. 2350.") Filed Apr. 7, 1905. Frank C. Jordan, Clerk. By G. H. S. Dryden, Deputy. Hamilton Gay Howard, Counsel for Appellant. Address #524 Hayward Building, Cor. Montgomery & California Sts. San Francisco, California.

181 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Monterey, plaintiff and appellant and David Jacks, defendant and respondent wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validiy; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in

question the construction of a clause of the Constitution, or of
182 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The City of Monterey as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of March, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] S. F. 2350 In the Supreme Court of the United States of America: October Term, 1904. The City of Monterey, Plaintiff & Appellant, *vs.* David Jacks, Defendant & Respondent. (Original.) Writ of Error. Filed Apr- 7–1905 Frank C. Jordan, Clerk. By G. H. S. Dryden Deputy Hamilton Gay Howard, Counsel for Appellant. Address: 524 Hayward Building, San Francisco, California.

183 UNITED STATES OF AMERICA, *ss:*

To David Jacks, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of California wherein The City of Monetery is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, Associate Justice of the

Supreme Court of the United States, this tenth day of March, in the year of our Lord one thousand nine hundred and five.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

On this fifth day of April, in the year of our Lord one thousand nine hundred and five, personally appeared Richard De Lancie Office Deputy U. S. Marshal Northern District of California before me, the subscriber, and makes oath that he delivered a true copy of the within citation to David Jacks, in the city of Montery, State of California

R. DE LANCIE,
Office Deputy U. S. Marshal Northern District of California.

Sworn to and subscribed the 5th day of April, A. D. 1905.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

J. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] S. F. 2350 Marshal's Docket No. 3648 In the Supreme Court of the United States of America: October Term, 1904. The City of Monterey, Plaintiff & Appellant *vs.* David Jacks, Defendant & Respondent. Original Citation. Filed Apr. 7--1905 Frank C. Jordan, Clerk By G. H. S. Dryden Deputy. Hamilton Gay Howard, Counsel for Appellant. Address: 524 Hayward Building, San Francisco, California.

184 Copy.

In the Supreme Court of the United States of America.

Bond for Costs and Damages on Appeal.

THE CITY OF MONTEREY, Plaintiff and Appellant,
vs.
DAVID JACKS, Defendant and Respondent.

Whereas, the Plaintiff and Appellant in the above entitled action filed a Petition for a Writ of Error, under Sections 709, 1000, 1003, and 1008 U. S. Revised Statutes, to the Supreme Court of the State of California, from a final judgment entered against it, said City of Monterey, in said action, in said Supreme Court of the State of California, in favor of the said David Jacks, Defendant and Respondent, in said action on the eleventh day of July, 1903, for possession of and title to The Pueblo Lands of said City of Monterey, in said State, and which said petition has been allowed and said Writ of Error granted by Justice Brown, on plaintiff and appellant filing herein a bond of One Thousand ($1,000.) Dollars, in conformity with Section One Thousand of the United States Revised Statutes:

Now Therefore, in consideration of the premises and of such appeal, the undersigned, American Bonding Company of Baltimore, a corporation organized and existing under the Laws of the State of Maryland, and duly licensed to transact business in the District of Columbia, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding One Thousand ($1,000.) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said American Bonding Company of Baltimore, has caused these presents to be signed by its proper Officers and its Corporate Seal hereto affixed, this tenth day of March, A. D. 1905.

(Signed) AMERICAN BONDING COMPANY
OF BALTIMORE,
[SEAL.] By GEORGE L. RADCLIFFE,
Ass't to President.

Attest:
EDWIN W. POE.

Approved by—
BROWN,
Associate Justice of the Supreme Court
of the United States.

185 STATE OF MARYLAND, *City of Baltimore, ss:*

On this tenth day of March A. D. 1905, before me, Millard Leonard, the subscriber, a Notary Public for the State of Maryland, duly appointed to take proof and acknowledgment of Deeds and other instruments, came George L. Radcliffe, Ass't to President, and Edwin W. Poe, Secretary, of the American Bonding Company of Baltimore, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the Seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Notarial Seal at the City of Baltimore the day and year first above written.

(Signed) MILLARD LEONARD,
[SEAL.] *Notary Public.*

Extracts from Charter of the American Bonding Company of Baltimore.

"That the Directors shall be elected annually by the stockholders on the Second Monday in January in each year, and they shall elect from their number at the first meeting of the Board, a President, one or more Vice-Presidents, an Executive Committee, to be composed of five or more members of the Board, of which the President and Vice-Presidents shall be members *ex-officio;* said Directors shall also have power to elect a Secretary and a Treasurer (which offices may be held by one person), and shall also have power to elect one or more Assistant Secretaries and Assistant Treasurers (which offices may be held by one person), and to appoint and employ such other officers, clerks and agents, as the business of said Company shall from time to time require."

Extract from the Minutes of the Proceedings of the Board of Directors of the American Bonding Company of Baltimore at the Meeting Held June 1st, 1896.

186 "Resolved, That the President or Vice-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such powers of attorney to accept process for and on behalf of this Company, or to authorize the attorneys and agents to execute bonds for and on behalf of this Company, as shall be needful, to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby empowered and directed to authenticate such appointments, affixing the Corporate Seal of the Company to same."

Extract from the Minutes of the Proceedings of the Board of Directors of the American Bonding Company of Baltimore at the Meeting Held on January 10th, 1905.

Resolved, By the Board of Directors of the American Bonding Company of Baltimore, on this 10th day of January, 1905, that two persons be elected officers of the Company, to be known each as Assistant to President.

"It is [illegible] resolved, That both persons, or either of said persons, appointed or elected to be Assistant to President, shall on and from the date of said appointment or election, be authorized and empowered, on behalf of said American Bonding Company of Baltimore, to sign, execute, certify or endorse all bonds, undertakings, deeds, certificates, checks, drafts, debentures, contracts or other instruments or writings, except certificates of the stock of the said American Bonding Company of Baltimore, to the same effect and with the same binding obligation as though said bonds, undertakings, deeds, certificates, checks, drafts, debentures, contracts or other instruments or writings, had been signed, executed, certified or

endorsed by the President or a Vice-President of the said American Bonding Company of Baltimore.

Election of officers for the ensuing year then being in order, was proceeded with in due form, the following gentlemen being unanimously elected, by ballot:

President, George Cator: First Vice-President, Chas. A. Webb; Second Vice-President, Ernest Hoen, Jr.: Secretary, Edwin W. Poe: Treasurer, Wm. E. P. Duvall: Assistant-to-President, Heber H. Stryker: Assistant-to-President, George L. Radcliffe: Assistant Secretary, Charles R. Laurenson: Assistant Treasurer, F. Buchanan Owen.

I hereby certify that the above are true extracts from the Charter of the Company and from the Minutes of the Board of Directors of the American Bonding Company of Baltimore, held June 1, 1896, and January 10th, 1905, respectively.

In testimony whereof, I hereunto set my hand and affix the seal of the Company this 10th day of March, 1905.

[SEAL.] (Signed) EDWIN W. POE, *Secretary.*

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond filed April 7th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk.*
By GEO. H. S. DRYDEN, *Deputy.*

187 [Endorsed:] Copy. S. F. 2350. In the Supreme Court of the United States of America. The City of Monterey, Plff. and App. *vs.* David Jacks, Deft. & Resp. Bond for costs, etc. Filed Apr. 7, 1905 Frank C. Jordan, Clerk, by G. H. S. Dryden, Deputy.

188 In the Supreme Court of the State of California.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed pages 1 to 186 inclusive contain a true and correct copy of the record in the matter of the City of Monterey *vs.* David Jacks as shown by the records of my office.

Witness my hand and seal of the Court, this 4th day of May, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk,*
By G. H. S. DRYDEN, *Deputy.*

Endorsed on cover: File No. 19,775. California Supreme Court. Term No. 274. The City of Monterey, Plaintiff in Error, *vs.* David Jacks. Filed May 25th, 1905. File No. 19,775.

MAR 12 1906
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA.

October Term, 1905.

No. [redacted]27

THE CITY OF MONTEREY,
Plaintiff in Error,

VERSUS

DAVID JACKS,
Defendant in Error.

In Error to Supreme Court of State of California.

On Motion to Dismiss and Affirm.

BRIEF AND ARGUMENT OF
HAMILTON GAY HOWARD
FOR PLAINTIFF IN ERROR.

(FILE No. 19,775).

IN THE SUPREME COURT OF THE UNITED STATES.

IN ERROR TO SUPREME COURT OF STATE OF CALIFORNIA.

THE CITY OF MONTEREY,
PLAINTIFF IN ERROR,

vs.

DAVID JACKS.

Oct. Term, 1905. No. 274.

STATEMENT OF CASE.

This consolidated case, (R. p. 60) "ACTIONS TO QUIET TITLE," comes to this Court by virtue of a Writ of Error, issued by it to the Supreme Court of the State of California, in accordance with a Petition therefor, under and by virtue of sections 709, 1[illegible], and 1008 of Revised Statutes of the United States, to review, re-examine and reverse the final judgment or decree of said "highest court" in said State.

The legal question, in brief, involved, is that of TITLE to the so-called "PUEBLO LANDS OF THE CITY OF MONTEREY", containing 29, 698, 53-100 acres, in said state; GRANTED said City when a Pueblo, by Spain and Mexico, long before the execution of the Treaty of Guadalupe-Hidalgo and its Protocol, between the last-named Nation and the United States of America,—their boundaries marked by The Mexican Territorial Deputation, July 24, 1830; CONFIRMED to it by the proper judicial authorities of the United States of America subsequent to said treaty (Record p. 25), and PATENTED to said City by letters-patent from the United States of America (Record pp. 30-34): under and by virtue of which TREATY, CONFIRMATION AND PATENT, said City of Monterey brought said "actions to quiet title", against defendant-in-error; resulting eventually in the adverse final judgment aforesaid, which decides, in part, that, said State, and it alone, succeeded to Mexico as "SUCCEEDING SOVEREIGN" in which the paramount title vested in said Pueblo Lands on "CHANGE OF FLAGS": said judgment "necessarily involving" the federal question of State

versus federal title in, to, and jurisdiction upon and over, said Pueblo Lands, from the date of said treaty to the issuance of said patent, though not specially set up in the pleadings; contravening general and special U. S. Congressional legislation and U. S. Federal Judicial determinations, both, to the contrary, in principle; and thus deciding that said patent Title is of no force or effect; as more fully appears hereinafter.

The statement of facts, as given in said "final judgment", is as follows:—

"LORIGAN, J.—Actions to quiet title.

Monterey at the date of cession of California to the United States WAS A MEXICAN PUEBLO, and, by a special concession from the SPANISH CROWN, was entitled to more than the four square leagues of land generally allotted to PUEBLOS.

The City of Monterey was incorporated by an act of the legislature of this state, of date March 30, 1850, (Stats. 1850, p. 131,) and thereunder succeeded to all the legal rights and claims of the former PUEBLO to its PUEBLO LANDS.

On March 2, 1853, said city, by its attorney, D. R. ASHLEY, duly retained for that purpose by the city, presented to the United States board of land commissioners its petition praying for a confirmation of the PUEBLO GRANT TO THE PUEBLO OF MONTEREY, and a decree was made accordingly on January 22, 1856, confirming its title. An appeal was taken from this decree by the United States, which appeal was on June 16, 1858, dismissed, with leave to the city to proceed upon the commissioners' decree as a final decree of confirmation.

In 1857 the original act incorporating the city of Monterey was amended, and by section 7 thereof it was provided as follows: "The trustees may also pay for the expenses of prosecuting the title of the city before the United States land commissioners and before the United States courts, AND FOR THAT PURPOSE MAY SELL AND TRANSFER ANY PROPERTY, RIGHT OR FRANCHISE, UPON SUCH TERMS AND FOR SUCH PRICE AS MAY BY THEM BE DEEMED REASONABLE."—(Stats. 1857, p. 55.)

On January 24, 1859, said ASHLEY presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and, there being no funds in the treasury to pay it, THE BOARD OF TRUSTEES PASSED A RESOLUTION DIRECTING THAT A SALE OF ALL

THE PUEBLO LANDS OF THE CITY, OR SO MUCH OF THEM AS MIGHT BE NECESSARY TO PAY THE CLAIM OF SAID ASHLEY, BE MADE AT PUBLIC AUCTION ON THE NINTH DAY OF FEBRUARY, 1859.

Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the ENTIRE PUEBLO TRACT WAS BID IN BY THE SAID D. R. ASHLEY AND THE DEFENDANT, DAVID JACKS, FOR THE SUM OF $1,002.50, being the amount of the indebtedness and the necessary expenses of sale; no one offering to purchase less than the whole, or bid any higher amount.

Thereafter said trustees made, executed, and delivered a conveyance of said lands, dated February 9, 1859, but acknowledged February 12, 1859, in favor of said D. R. ASHLEY and the defendant, DAVID JACKS, and in the conveyance the proceedings taken by the trustees in the matter of such sale were recited. This conveyance was recorded in the county recorder's office of the county of Monterey, on June 11, 1859.

On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows: "Sec. 2. All sales and conveyances made by the corporate authorities of said city since the eighth day of February, 1859, and which conveyances purport to have been recorded in the county recorder's office of Monterey County, PURPORTING TO CONVEY PUBLIC LANDS, OR LANDS CONFIRMED TO SAID CITY OF MONTEREY, IN PURSUANCE OF THE ACT OF CONGRESS OF MARCH 3, 1851, (9 U. S. Stats. 631.) and entitled An act to ascertain and settle the private land claims in the State of California, ARE HEREBY RATIFIED AND CONFIRMED."—(Stats. 1865-1866, p. 835.)

On September 4, 1869, ASHLEY conveyed all his interests in the land in controversy to the defendant.

During the trial below it was proven by production of the records of deeds from the office of the county recorder of Monterey County that between February 7, 1859, a few days prior to the execution of the deed in question, and the second day of April, 1866, the date of the passage of the act, there was no record of any other conveyance by the corporate authorities of said city, purporting to convey any of the PUEBLO LANDS OF THE CITY OF MONTEREY, other than the conveyance to said ASHLEY AND JACKS.

THE PATENT OF THE UNITED STATES TO THE CITY OF MONTEREY WAS ISSUED NOVEMBER 19, 1891, AND INCLUDES THE LAND

IN CONTROVERSY, to quiet its title to which the plaintiff shortly afterwards brought these suits.

There are two cases submitted upon this appeal, and they will be both disposed of in this opinion. They are precisely similar; the parties are identical; each is an action to quiet title; both depend upon the same facts and present the same propositions of law, and differ only as to the amount of land involved in each. Judgment in both cases went for the defendant in the court below, and on this appeal it is contended on behalf of the APPELLANT,—

1.—THAT THE TRUSTEES OF THE CITY OF MONTEREY HAD NO POWER UNDER THE CHARTER TO SELL OR CONVEY THE ENTIRE PUEBLO LANDS, OR ANY CONSIDERABLE PORTION THEREOF, AS A WHOLE, AND THAT THE SALE TO ASHLEY AND DEFENDANT JACKS, WAS THEREFORE VOID;

2.—THAT THE PERSONS PURPORTING TO ACT AS TRUSTEES OF THE CITY OF MONTEREY, AND WHO EXECUTED THE DEED TO ASHLEY AND DEFENDANT, WERE NEVER TRUSTEES OF THE CITY;

3.—THAT THE ACT OF APRIL 2, 1866, DID NOT RATIFY OR PURPORT TO RATIFY THE SALE OR DEED IN QUESTION;

4.—THAT THE LEGISLATURE HAD NO POWER TO RATIFY OR VALIDATE THAT TRANSACTION.

Errors are also assigned to rulings of the court on the admission of evidence.

THE PRINCIPLE POINT IN THIS CASE IS RELATIVE TO THE POWER AND CONTROL OF THE LEGISLATURE OVER THE LANDS OF THE PUEBLOS TO WHICH MUNICIPALITIES CREATED BY THE LEGISLATURE SUCCEEDED." (Record pp. 63-64)

HAS THIS COURT JURISDICTION?

The following analysis of a few of the latest leading cases, in this Court, bearing thereon, together with citations therein, it is hoped, will help to lighten the labor of this Court:—

"Columbia Water Power Company vs. Columbia Electric Street Railway, Light and Power Company," 172 U. S. 475: January 9, 1899: By Mr. JUSTICE BROWN; who says:

"To the argument that the Federal right was not "specially

set up and claimed" in the language of the Revised Statutes, section 709, it is replied that THIS IS NOT ONE OF THE CASES IN WHICH IT IS NECESSARY TO DO SO. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here: (1): Where is drawn in question the validity of a treaty, or statute of, or authority exercised under the United States, and the decision is against their validity:" (2): "Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;" (3): "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or Commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

"There is no doubt that under the third class the Federal right, title, privilege or immunity must be, WITH POSSIBLY SOME RARE EXCEPTIONS, specially set up or claimed to give this Court jurisdiction"; (citing cases).

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of the validity, this Court has repeatedly held that, IF THE FEDERAL QUESTION APPEARS IN THE RECORD AND WAS DECIDED, OR SUCH DECISION WAS NECESSARILY INVOLVED IN THE CASE, AND THE CASE COULD NOT HAVE BEEN DETERMINED WITHOUT DECIDING SUCH QUESTION, THE FACT THAT IT WAS NOT SPECIALLY SET UP AND CLAIMED IS NOT CONCLUSIVE AGAINST A REVIEW OF SUCH QUESTION HERE"; (citing cases). AGAIN:

"The case under consideration falls within the second class, and, as it appears from THE RECORD AND FROM THE OPINION OF THE COURT, WHICH MAY BE EXAMINED FOR THAT PURPOSE, (Kreiger-vs-Shelby Railroad, 125 U. S. 39.) that the question was presented and decided, that the act of 1892, affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the

act of 1887, because that act properly construed conveyed no exclusive rights, WE THINK THE FEDERAL QUESTION SUFFICIENTLY APPEARS."

In line with the foregoing decision, is that rendered in "Pittsburg, &c., Railway -vs- Loan and Trust Company", 172, U. S. 507: By Mr. JUSTICE HARLAN:—

"The first question to be considered relates to the jurisdiction of this Court to review the final judgment of the Supreme Court of Ohio.

The contention of the defendant in error is that the record presents no Federal question which this Court will review; and that the state court based its decision upon an independent ground, NOT INVOLVING A FEDERAL QUESTION, but depending upon principles of general law and broad enough to sustain its judgment. * * * Upon looking into THE RECORD, we find that the defendant railway company claimed in its answer that if a lien at any time attached to the property in question to secure the 36 bonds purchased by Lynde, such lien was wholly divested and discharged by the above proceedings in THE FEDERAL COURTS under which that company claims title. THIS, IT WOULD SEEM, WAS SUCH AN ASSERTION OF A RIGHT AND TITLE UNDER AN "AUTHORITY EXERCISED UNDER THE UNITED STATES," AS GIVES THIS COURT JURISDICTION TO RE-EXAMINE THE FINAL JUDGMENT OF THE SAME COURT." (citing cases.)

"Blackburn-vs-Portland Mining Company," 175 U. S. 571: by Mr. JUSTICE SHIRAS. Statement of case, in brief, is as follows:—

Action was brought in U. S. Circuit Court, District of Colorado, between a citizen of that state and another citizen and the defendant corporation of the state of Iowa, based on SECTIONS 2325 and 2326, REVISED STATUTES, relative to MINING CLAIMS: motion to dismiss bill in lower court on four grounds, to-wit; (1) no jurisdiction; (2) both parties to suit, citizens of same state; (3) amount in controversy, does not appear to be $2,000; (4) cannot, under Constitution and Statutes of United States, be brought into this court. Case was dismissed below, bill of exceptions signed, and it was certified here, the only question involved being JURISDICTION.

After giving in full said "SECTIONS 2325, 2326", the learned JUSTICE says; "The first observation to be made is that Congress did not intend to prescribe jurisdiction in any particular court, State or Federal,—the provision reading, it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of possession, and prosecute the same with reasonable diligence to final judgment." The learned Justice cites the decision in "Romie-vs-Casanova", 91 U. S. 379, which is, in brief, as follows:—

"No Federal question is presented by the record in this case. The Action was brought to recover the possession of certain lands. BOTH PARTIES CLAIM TITLE FROM THE CITY OF SAN JOSE; and the question to be determined was, WHICH OF THE TWO HAD ACTUALLY OBTAINED A GRANT" (from said city) "OF THE PARTICULAR PREMISES IN CONTROVERSY. THE TITLE OF THE CITY WAS NOT DRAWN IN QUESTION. Even if it depended upon the treaty of Guadalupe-Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it." The Writ was accordingly and properly dismissed for want of jurisdiction.

He cites also the case of "McStay-vs-Friedman", 92 U. S. 723; Action in EJECTMENT, for a part of the Pueblo Lands confirmed to the City of San Francisco, BY A SPECIAL ACT OF CONGRESS, the validity and operative effect of which were not questioned, and this Court held that it had no jurisdiction to review the judgment of the Supreme Court of California, saying:—

"No Federal question was INVOLVED IN THE DECISION OF THE SUPREME COURT. THE CITY TITLE WAS NOT DRAWN IN QUESTION."

Also, "Gold Washing and Water Company-vs-Keyes", 96 U. S. 199; suit in equity, in a state court of California, brought on petition into the U. S. Circuit Court, on the ground that its determination involved the construction of certain laws of the United States affecting rights in public and mineral lands. The Circuit Court remanded the case to the state court on the basis that NO REAL OR SUBSTANTIAL CONTROVERSY, PROPERLY WITHIN THE JURISDICTION OF A FEDERAL COURT, AP-

PEARED TO BE INVOLVED. The judgment of the Circuit Court was affirmed by this Court in an Opinion of Mr. CHIEF-JUSTICE WAITE, a portion of which was as follows:—

"The attempt to transfer this cause was made under that part of section 2 of Act of 1875, which provides for the removal of suits "arising under the Constitution or laws of the United States." In the language of CHIEF-JUSTICE MARSHALL, a case "may truly be said to arise under the Constitution or a law of the United States WHENEVER ITS CORRECT DECISION depends upon the CONSTRUCTION OF EITHER"; Cohens-vs-Virginia, 6 Wheat. 379; OR WHEN "THE TITLE OR RIGHT SET UP BY THE PARTY MAY BE DEFEATED BY ONE CONSTRUCTION OF THE CONSTITUTION OR LAW OF THE UNITED STATES, OR SUSTAINED BY THE OPPOSITE CONSTRUCTION." Osborn-vs-Bank of U. S. 9 Wheat. 822: Mr. CHIEF-JUSTICE WAITE continuing, says,—

"In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable MINES, that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they alleged that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. THEY STATE NO FACTS TO SHOW THE RIGHT THEY CLAIM, OR TO ENABLE THE COURT TO SEE WHETHER IT NECESSARILY DEPENDS UPON THE CONSTRUCTION OF THE STATUTES. * * * The Statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because, in the course of litigation, it may become necessary to give a construction to the Constitution or laws of the United States; THE DECISION OF THE CASE MUST DEPEND UPON THAT CONSTRUCTION. THE SUIT MUST, IN PART AT LEAST, ARISE OUT OF A CONTROVERSY BETWEEN THE PARTIES IN REGARD TO THE OPERATION AND EFFECT OF THE CONSTITUTION OR LAWS UPON THE FACTS INVOLVED."

Another case cited, is "Bushnell-vs-Crooke Mining Company", 148 U. S. 682; of which he says,—

"The ruling in Bushnell-vs-Crooke Mining Company, is di-

rectly applicable to the present case. There a writ of error brought to this Court a judgment of the Supreme Court of the state of Colorado. The suit in ejectment brought by the Crooke Mining Company in a state court against Bushnell, to recover possession of a certain portion of the SURFACE LOCATION OF A MINING CLAIM on Ute Mountain, and grew out of CONFLICTING AND INTERFERING LOCATIONS OF MINING CLAIMS. The claim of the latter was first located, but when the company applied for a patent Bushnell filed an adverse claim to a portion of the same location, and thereafter, under section 2326 of the Revised Statutes, and within the time prescribed therein commenced his action in the state court. * * * The question presented on the trial of the controversy arose out of CONFLICTING AND INTERFERING LOCATIONS, and the court gave and refused certain requests to charge the jury, which appear at length in the report of the case in this Court. The trial resulted in a verdict and judgment in favor of the plaintiff. An appeal was taken to the Supreme Court of Colorado, which affirmed the judgment of the lower court. THE SUPREME COURT OF COLORADO RESTED ITS JUDGMENT UPON THE GENERAL PROPOSITION THAT THE TRIAL COURT HAD CORRECTLY STATED TO THE JURY THE PRINCIPAL POINT IN CONTROVERSY, AS A MATTER OF FACT, WHAT WAS THE COURSE OF THE CONFLICTING LODES. The case was then brought to this Court and was heard on a motion to dismiss the writ or affirm the judgment.

Mr. JUSTICE JACKSON, in sustaining the motion to dismiss, said:—

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, AND AN EXAMINATION OF THE OPINION OF THE SUPREME COURT AFFIRMING THE ACTION OF THE TRIAL COURT AS TO INSTRUCTIONS GIVEN, AS WELL AS TO ITS REFUSAL TO GIVE THE INSTRUCTIONS ASKED BY THE DEFENDANTS BELOW, FAILS TO DISCLOSE THE PRESENCE OF ANY FEDERAL QUESTION. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, OR THAT ANY SUCH RIGHT WAS DENIED THEM, OR WAS EVER PASSED UPON BY THE SUPREME COURT OF THE STATE, NOR DOES IT APPEAR, FROM ANYTHING DISCLOSED IN

THE RECORD, THAT THE NECESSARY EFFECT IN LAW OF THE JUDGMENT WAS THE DENIAL OF ANY RIGHT CLAIMED UNDER THE LAWS OF THE UNITED STATES.

"THE DECISION of the Supreme Court of Colorado IN NO WAY brought into question the validity or even construction of ANY FEDERAL STATUTE, and it certainly did not deny to the plaintiff in error any right arising out of the construction of the Federal Statutes." Accordingly the writ of error to the Supreme Court of Colorado was dismissed: Mr. Justice Shiras remarking:—

"The legal import of this decision plainly is that a controversy between rival claimants under section 2325, 2326 of the Revised Statutes MAY BE PROPERLY DETERMINED BY A STATE COURT, and that the judgment of a State Supreme Court, IN SUCH A CASE, cannot be reviewed by this Court simply because the parties were claiming rights under the Federal statute."

Mr. Justice Shiras, also, cites,—"Colorado Central Consolidated Mining Co.-vs-Turck," 150 U. S. 148, brought to this Court, on a writ of error, from the U. S. Circuit Court of Appeals for the 8th Circuit: an action of EJECTMENT for possession of a certain MINING CLAIM that had been tried in the U. S. Circuit Court for the District of Colorado; taken by writ of error to U. S. Circuit Court of Appeals for the 8th circuit, and thence by writ of error to this Court; the learned Justice says, —"The case was here heard on a motion to dismiss on the ground that the suit was between citizens of different states, and that, therefore, under the Judiciary Act of March 3, 1891, the judgment of the Circuit Court of Appeals was final. An attempt was made in argument to sustain the right of this Court to take jurisdiction because, although the suit was between citizens of different states, yet that the solution of the disputed ownership depended upon the construction and application of section 2322 of the Revised Statutes, CONCERNING THE DIP AND APEX OF LODES, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed."

Also, the case of "Gillis-vs-Stinchfield", 159 U. S. 658;—"a suit brought in a state court of California and concerned the OWNERSHIP OF A MINING CLAIM." Says Mr. Justice Shiras,—

"The case was brought to this Court, and it was claimed that, as the question in dispute could only be determined by an application of Sections 2322 and 2336 of the Revised Statutes of the United States, such a state of facts appearing by the record, there was disclosed a Federal question which, of itself, gave this Court jurisdiction to review the judgment of the Supreme Court of the State. But a motion to dismiss the writ of error was allowed. It is true that this Court put its judgment on the ground that the judgment of the State Supreme Court WAS BASED UPON AN ESTOPPEL, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to TITLES DERIVED UNDER THE MINING LAWS OF THE UNITED STATES MAY BE LEGITIMATELY DETERMINED IN THE STATE COURTS, and that to enable this Court to review the JUDGMENT IN SUCH A CASE it must appear not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties."

The last case cited in said Opinion of Mr. Justice Shiras, is that of "Borgmeyer-vs-Idler," 159 U. S. 408,—the matter in controversy being an AWARD OF MONEY UNDER A TREATY OF THE UNITED STATES WITH A FOREIGN POWER, providing for the submission of claims against that power to arbitration; this Court holding that the case presented, in no way drew in question the validity or construction of the treaty, so as to confer jurisdiction on this Court to review the judgment of a Circuit Court of Appeals: the case of "Gill-vs-Oliver," 11 How. 529, 545, was cited, and the following passages of the Opinion therein rendered by Mr. Justice Grier, to-wit:—

"Both parties claim money in court; and, in order to test the value of their respective assignments they introduce the HISTORY OF THE CLAIM from its origin. The treaty and award are facts in that history. They were before the court, but as facts and not for construction. If "A" held land UNDER A PATENT from the United States or a Spanish grant ratified by treaty, AND HIS HEIRS OR ASSIGNS DISPUTE AS TO WHICH HAVE THE BEST TITLE UNDER HIM, this does not make a case for the jurisdiction of this Court under the twenty-fifth section of the Judiciary Act. IF NEITHER THE VALIDITY NOR THE CONSTRUCTION OF THE PATENT OR TITLE UNDER

THE TREATY IS CONTESTED, IF BOTH PARTIES CLAIM UNDER IT,"—(NOT THE CASE AT BAR, FOR ONLY PLAINTIFF-IN-ERROR CLAIMS UNDER THE PATENT, AS IT WAS ISSUED ONLY TO IT:)—"and the contest arises from some question without or dehors the patent or treaty, it is plainly no case for our interference under this section. That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it."

Mr. Justice Shiras closes as follows:—

"In a case, therefore, like the present, where Federal jurisdiction does not arise because the parties are citizens of different states, and where no question is made as to the meaning and construction of the Statutes of the United States, the state courts are to be regarded, WITHIN THE LETTER AND MEANING OF SECTION 2326, as courts of "competent jurisdiction to determine the right of possession." Judgment of the Circuit Court is therefore affirmed. Justice McKenna dissenting, and Justice Brown not sitting.

"In Delamar Nevada G. N. Co.-vs-Nesbitt", 177 U. S. 523,—Mr. JUSTICE BROWN, rendered the Opinion of the Court,—Mr. Justice McKenna dissenting,— and used the following language as part thereof, to-wit:—

"We have repeatedly held that to sustain a writ of error from this court something more must appear than that the parties claim title under an Act of Congress." * * * "It is manifest that the object of SECTION 709 was not to give a right of review wherever the validity of an act of Congress was drawn in question, BUT TO PREVENT STATES FROM FRITTERING AWAY THE AUTHORITY OF THE FEDERAL GOVERNMENT BY LIMITING TOO CLOSELY THE CONSTRUCTION OF FEDERAL STATUTES. Hence the writ of error will only lie where the decision is adverse to the right claimed." * * * "There is NO FEDERAL QUESTION PRESENTED BY THE RECORD in this case, and it must, therefore, be dismissed."

THE FEDERAL QUESTION, NECESSARILY INVOLVED.

The Federal question in detail,—(to repeat the words of this Court,—"right, title, privilege or immunity,"—"presented,"—"raised,"—"necessarily involved,"—"appeared to be

involved,"—"and the case could not have been determined without deciding such question,"—"an assertion of a right and title under an "authority exercised under the United States," —"where the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States or sustained by the opposite construction,"—"the decision of the case must depend upon that construction,"—"the suit must, in part at least, arise out of a controversy between parties in regard to the operation and effect of the Constitution or laws upon the facts involved,"—"it must in some form appear upon the record, by a statement of facts,"—"which rights are dependent upon the laws of the United States,"—"where a proper case is made on a writ of error to a state court,"—"where an examination of the Opinion of the Supreme Court fails" (not) "to disclose the presence of any Federal question,"—"nor does it" (not) "appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States,"—"the validity of any right claimed under the laws of the United States,"—"the validity * * * the construction of the PATENT or title under the treaty is contested,")—in the consolidated case at bar, is the following legal, equitable, constitutional and international proposition:—

WHICH TITLE TO SAID "PUEBLO LANDS OF THE CITY OF MONTEREY" IS VALID?—to-wit; FIRST,—that title acquired by David Jacks, defendant in error, and D. R. Ashley, jointly, (the latter conveying his one-half to said Jacks), based upon a public "sale" of the same, containing 29,698,53-100 acres, by the City's alleged Trustees, to pay its indebtedness solely, of seven hundred and fifty dollars ($750.00), and interest, to its Attorney, said D. R. Ashley, for his professional services in securing only the CONFIRMATION to it, of them, by the United States Commission and United States District Court, to which tribunals special jurisdiction had been given in part, by Act of the United States Congress, of March 3, 1851; said Trustees' alleged authority to sell having been granted by an Act of the legislature of said State, only,—(March 4, 1857),—and which alleged "sale" was confirmed only by another Act of said state legislature,—(April 2, 1866)—without any Federal confirmatory legislation,—(of both of which Acts this Court will take judicial notice, (Rose's Digest, 2 p. 1234).—and said

authority to sell was denied by plaintiff in error at the trial below, (Record, p. 43); said Pueblo Lands being, at the time of said "sale," unsurveyed, and therefore unpatentable, in accordance with said Act of March 3, 1851, and the legal title in fee, to them, vesting in the United States, as per "MEADER-vs-NORTON," 11 Wall. 455; said lands being unassessed to anyone, and said Jacks paying no taxes thereon for some eighteen years after said "sale" aforesaid (Record, p. 50); together with the final judgment of said Supreme Court of California, from which this appeal is taken: or,

SECOND: that title acquired by said CITY OF MONTEREY, plaintiff in error, as the legal, constitutional and international corporate successor of the former "PUEBLO OF MONTEREY", under and by virtue of Article I, Sec. 10, and Article VI, of the U. S. Constitution; Articles VIII and IX of the treaty of Guadalupe-Hidalgo; together with the Protocol thereof—(the author of which, as Justice, subsequently rendered the Opinion in Meader-vs-Norton, supra)— which latter provides that the grants of land made by Mexico in the ceded territory should not be annulled, but should preserve the legal value they formerly possessed (See, Treaties and Conventions, Mexico, 1848 ,p. 693)—(Appendix, Seq.); the Act of Congress of March 3, 1851; together with certain other Acts of Congress showing NATIONAL SOVEREIGNTY over Pueblo Lands, generally, and certain Decisions rendered by the Supreme Court of the United States of America applicable to the Federal question herein involved, and hereinafter analyzed in part; together with the Confirmation to it of said title by the United States Commission and said United States District Court, aforesaid, and finally, by said LETTERS-PATENT for the same, issued by the UNITED STATES OF AMERICA, directly to it,—(Leese-vs-Clark, 18 Calif., 571),—on the Nineteenth day of November, in the year Eighteen Hundred and Ninety-one, in which year and the year 1896, these combined "ACTIONS TO QUIET TITLE" were begun in the Superior Court of Monterey, and finally decided, as one suit, adversely to plaintiff in error, on appeal, by the said Supreme Court of the State of California, on the eleventh day of July, in the year 1903, and from which final judgment this appeal was taken to this Court, in accordance with said Sections aforesaid of the Revised Statutes; which "final judgment" appears in full in the 139 Cal. Reps., (pp. 542-559), and also in the record

herein (pp. 61-74),—the gist of the doctrine therein asseverated, as to Pueblo Lands, being, that, "the Pueblos had "no indefeasible proprietary interest in them; that they were "held IN TRUST FOR PUBLIC AND MUNICIPAL PURPOSES, SUBJECT "TO THE CONTROL AND DISPOSITION OF THE MEXICAN "GOVERNMENT;" (Mark the following!) "that upon the es- "tablishment of OUR STATE GOVERNMENT IT succeeded "to the same sovereignty over them as was exercised by the "former government, and that their control and disposition "came fully, entirely, and absolutely within the power of the "legislature as representing such sovereignty." * * * "THE FORMER PUEBLO TRUST, AND THE OWNER- "SHIP OF LANDS INCIDENT TO IT, PASSED WITH THE "CHANGE OF FLAGS, AND VESTED IN THE STATE OF "CALIFORNIA AS SUCCEEDING SOVEREIGN."—etc. etc.—thus the case necessarily involves the Federal question as to which "SUCCEEDING SOVEREIGN" the title to said Pueblo Lands, in dispute, was vested in, under the treaty, under the U. S. Statute aforesaid, and under said U. S. Patent aforesaid, and whether Article I, Sec. 10, and Article VI, of the U. S. Constitution can or cannot be thus nullified by a State Supreme Court:

THIRD: Whether this Court can, legally and constitutionally, decide in this appeal, THE SAID PATENT for said Pueblo Lands, issued in conformity to a law of a co-ordinate branch of the same government (Act of March 3, 1851), by another co-ordinate branch, IS OR IS NOT VALID; and that a TITLE which had always vested, before said treaty, IN THE NATIONAL SOVEREIGNTIES OF SPAIN AND MEXICO, under their respective laws, AND NOT IN THEIR PROVINCES OR TERRITORIES, did,—by virtue of said treaty and Act of Congress of one of the sovereign NATIONS participant therein, and which NATION created, by law, the "State of California," as a member of the Federal Union,—pass to said so-called, "Succeeding Sovereign State," —WITHOUT OTHER SPECIAL FEDERAL LEGISLATION, BY WAY OF GRANT OF RELINQUISHMENT,—instead of to THE UNITED STATES OF AMERICA as has already, in other similar cases, been decided by this Court to be the law? (Vide, seq. Grisar-vs-McDowell, 6 Wall. 378-9; Palmer-vs-Low, 98 U. S., 16; Hoadley-vs-San Francisco, 124 U. S. 646; Bernal-vs-Lynch, 36 Cal. pp. 140-2 (Garber's brief); Baker-vs-Brickell, 87 Cal. 333-4.)

PARAMOUNT TITLE: HISTORICAL EXPOSITION.

That this court may be fully advised as to the NATIONAL character of the "paramount title" to PUEBLO LANDS, and sovereign jurisdiction over them, under successive Spanish, Mexican and American rule, contradistinguished from title to, and jurisdiction over them, as in effect claimed by said final decision aforesaid, in Province, Territory or State, the following condensed legal and historical exposition of their creation, preservation, attributes and prerogatives is submitted, in the hope that an examination thereof may be conducive to a helpful and correct solution of the "FEDERAL QUESTION" necessarily involved in this case.

"PUEBLOS" OR "NEW ESTABLISHMENTS."

(From Rockwell's Spanish and Mexican Law, page 444, Appendix No. 1.)—

"Instructions to be observed by the Commandant appointed to the NEW ESTABLISHMENTS of SAN DIEGO and MONTEREY," given by El Bailie Frior Don Antonio Bucareli y Urusu, (Governor), dated Mexico, 17th August, 1773.

"Article 2. The confusion which has reigned in the accounts, and the want of order which I have observed in everything else, have compelled me to establish this new method, and to appoint Captain Don Fernando Rivera y Moncada Commandant of SAN DIEGO and MONTEREY, because I am well informed of his good conduct or manner of proceeding, and of his knowledge of the NEW ESTABLISHMENTS, acquired in the employments and offices which he has therein obtained and in the PRESIDIOS of California for many years.

* * * * * * * *

"Article 12. With the desire to establish population more speedily in the NEW ESTABLISHMENTS, I for the present grant the commandant the power TO DESIGNATE COMMON LANDS, and also even TO DISTRIBUTE lands in private to such Indians as may most dedicate themselves to agriculture and the breeding of cattle, for having property of their own, the love of it will cause them to radicate themselves more firmly; but the commandant must bear in mind that it is very desirable not to allow them to live dispersed—each one on the lands given to them—but that they must necessarily have their house and

habitation in the town or mission where they have been established or settled."

"Article 13. I grant the same faculty to the commandant with respect to DISTRIBUTING lands to the other founders (pobladores) according to their merit and means of labor—THEY ALSO LIVING IN THE TOWN AND NOT DISPERSED,—declaring that in the practice of what is prescribed in this article and the preceding 12th, he must be in every respect in conformity with the provisions made in the collection of the laws respecting newly acquired countries and towns, (reduciones y poblaciones,) granting them legal titles for the owner's protection without exacting any remuneration for it or for the act of possession."

"Article 14. The commandant must be carefully attentive that the founders who go to the NEW ESTABLISHMENTS have the requisite arms for their defense and for assisting the garrisons of the PRESIDIOS OR MISSIONS in case of necessity, binding them to this obligation as a thing necessary for their own safety and that of their neighbors."

"Article 15. When it becomes expedient to change any mission into a PUEBLO, the commandant will proceed to reduce it to the civil and economical government which, ACCORDING TO THE LAWS, IS OBSERVED IN THE OTHER PUEBLOS OF THIS KINGDOM, giving it a name, and declaring for its patron the saint under whose auspices and venerable protection the mission was founded."

ROYAL ORDER OF THE 24TH OF OCTOBER, 1781.

Extracts from the Regulations for the government of the PROVINCE OF CALIFORNIA, by Don Felipe De Neve, governor of the same, dated in the royal presidio of SAN CARLOS DE MONTEREY, 1st of June, 1779, and Approved by His MAJESTY in Royal Order of the 24th October, 1781.

"TITLE THE FOURTEENTH, POLITICAL GOVERNMENT, AND INSTRUCTIONS RESPECTING COLONIZATION.

1st. The object of greatest importance towards the fulfillment of the pious intentions of THE KING, OUR MASTER, and towards securing to HIS MAJESTY the dominion of the extensive

country which occupies a space of more than two hundred leagues, comprehending the NEW ESTABLISHMENTS of the presidios and the respective ports of SAN DIEGO, MONTEREY and SAN FRANCISCO, being to forward the reduction of, and as far as possible to make this vast country,—(which with the exception of seventeen hundred and forty nine christians of both sexes in the eight missions on the road which leads from the first to the last named presidio, is inhabited by innumerable heathens,)—useful to the State, by erecting PUEBLOS of which people,—(gente de razon—literally, people of reason,)—who, being united, may encourage agriculture, planting, the breeding of cattle and successively the other branches of industry; SO THAT SOME YEARS HENCE THEIR PRODUCE MAY BE SUFFICIENT TO PROVIDE GARRISONS OF THE PRESIDIOS WITH PROVISIONS AND HORSES, thereby obviating the distance of transportation and the risks and losses which the ROYAL GOVERNMENT suffers thereby. With this just idea, THE PUEBLO OF SAN JOSE has been founded and peopled; and the erection of another is determined upon, in which the colonists and their families, from the provinces of Sonora and Sinaloa, will establish themselves, the progressive augmentation of which, and of the families of the troops, will provide for the establishment of other towns and FURNISH RECRUITS FOR THE PRESIDIO COMPANIES, THUS FREEING THE ROYAL REVENUE from the indispensible expenses at present required for these purposes; and it being necessary to establish rules for carrying all this into effect, the following INSTRUCTIONS will be observed:

* * * * * * * *

4th. The HOUSE-LOTS to be granted to the new pobladores are to be designated by government in the situations, and of the extent, corresponding to the locality on which THE NEW PUEBLOS are to be established, so that a square and streets be formed agreeable to the provisions of THE LAW OF THE KINGDOM; AND COMFORMABLE TO THE SAME, COMPETENT COMMON LANDS, (Egidos) SHALL BE DESIGNATED FOR THE PUEBLO AND PASTURE GROUNDS, WITH THE SOWING LANDS THAT MAY BE NECESSARY FOR MUNICIPAL PURPOSES. (Propios)."

5th. * * * The distribution which is to be effected of the HOUSE LOTS and PIECES OF LAND to the new colonists—MUST BE MADE IN THE NAME OF THE KING, OUR MASTER, BY THE GOVERNMENT, WITH EQUALITY,

— * * * and of ROYAL LANDS (realengas) as many as may be considered necessary shall be separated FOR THE PROPIOS OF THE PUEBLO, and the remainder of these as well as of the house-lots, shall be GRANTED IN THE NAME OF HIS MAJESTY, by the governor, to those who may hereafter come to colonize, * * *.

* * * * * * * *

7th. NEITHER CAN THE POBLADORES, NOR THEIR HEIRS, IMPOSE ON THE HOUSE OR PARCEL OF LAND GRANTED TO THEM, EITHER TAX, ENTAIL, REVERSION, MORTGAGE, (cento, vinculo, fianza, hipoteca,) OR ANY OTHER BURDEN, ALTHOUGH IT BE FOR PIOUS PURPOSES: AND SHOULD ANY ONE DO SO IN VIOLATION OF THIS JUST PROHIBITION, HE SHALL IRREMEDIABLY BE DEPRIVED OF HIS PROPERTY, AND HIS GRANT IPSO FACTO BE GIVEN TO ANOTHER COLONIST WHO MAY BE USEFUL AND OBEDIENT.

8th. The new colonists shall enjoy, for the purpose of maintaining their cattle the COMMON PRIVILEGE of the water and pasturage, fire-wood, and timber, OF THE COMMON FOREST AND PASTURE LANDS, to be designated according to law to each new pueblo.

9th. The new colonists shall be free and exempt from TITHES OR ANY OTHER TAX on the fruits and produce of the lands and cattle given to them, provided that within a year from the day on which the house-lots and parcels of land be DESIGNATED to them, THEY BUILD A HOUSE in the best way they can, AND LIVE THEREIN, upon the necessary trenches for watering their lands, placing at their boundaries, instead of landmarks, some fruit trees, or wild ones of some utility, at the rate of ten to each suerte.

10th. After the expiration of the five years they will pay the tithes TO HIS MAJESTY, for him to dispose of agreeably to HIS ROYAL PLEASURE, AS BELONGING SOLELY TO HIM, NOT ONLY ON ACCOUNT OF THE ABSOLUTE ROYAL PATRONAGE WHICH HE POSSESSES IN THESE DOMINIONS, but also because they are the produce of uncultivated and abandoned lands which are about to become fruitful at the cost of the large OUTLAYS AND EXPENSES OF THE ROYAL TREASURY. At the expiration of the said term of five years, the new pobladores and their descendants will pay, IN ACKNOWLEDGMENT OF THE DIRECT AND SUPREME

DOMINION WHICH BELONGS TO THE SOVEREIGN, one-half of a fanega of Indian corn for each irrigable suerte of land." * * * * * *

SPANISH PUEBLOS, HOW MADE.

Under Spanish Royal Order of October 15, 1754, LAND GRANTS were made by VICEROYS AND PRESIDENTS OF THE AUDIENCES, thereby removing from SPAIN to MEXICO all power and jurisdiction over the Mexican domain as a Province of the former, save THE RIGHT OF THE SOVEREIGN TO MODIFY OR REJECT THE SAME AT PLEASURE. (Hall's Mexican Law; Chap. IV, p. 26.)

Article 9, of said Royal Order, provides, that, the respective Audiences were to issue for the PROVINCES, IN THE KING'S NAME, the confirmations, after the fiscales had given an opinion favorable thereto." (Idem, Secs. 53-65: pp. 26-30.)

Section 68 reads, in part, as follows:—

"That the judges and ministers in whom IS SUBDELEGATED the jurisdiction for the sale and composition of the crown-lands shall proceed with suavity, temperance, and moderation, with verbal process, and not judicial, with those lands which the Indians may possess, and with the rest with which may be particularly necessary for their working, cultivation, and the rearing of cattle. * * * and as regarding those of a community,—AND THOSE WHICH ARE CONCEDED TO THEIR PUEBLOS FOR PASTURES AND COMMON-LANDS, (Exidos), THEY ARE NOT TO BE CHANGED:" (Idem: Chap. V, p. 31: Secs. 66-82.)

The following entitled SPANISH LAWS, ROYAL ORDERS AND ORDINANCES, cited in White's Recopilacion, and referred to hereinafter, were the only ones in force generally up to the year 1792, according to a Report made, on the 20th November, of that year, by Carlos de Urrutia and Fabian de Fonseca, to the Viceroy, Count de Revillagigedo, which is embraced in the fourth volume of the General History of the Royal Treasury, page 398: said laws, royal orders and ordinances bear the titles of,—

"ORDINANCE OF INTENDENTS OF DECEMBER 4, 1786"; "ORDER OF PEDRO NAVA, MILITARY COMMANDER, 1791"; "ROYAL ORDER, MARCH 23, 1798";

"DECREE OF JANUARY 4, 1813"; "ORDERS AND DECREES, 1814-1822".

Says Hall,—"There seems to have been no law or cedula (order) issued by THE SOVEREIGN OF SPAIN, repealing said laws of the Indies, nor the cedula (Order) of 1754, nor the Ordinance of Intendents. THEY MUST, THEREFORE, BE CONSIDERED AS HAVING BEEN IN FORCE UP TO THE INDEPENDENCE OF MEXICO; except so far as the one subsequent in date repealed that which was prior in date and in conflict therewith." (Idem: Chap. VI, Secs. 83-109.)

The above order of Pedro de Nava, was issued March 22, 1791, at Chihuahua, and reads, in part, as follows:—"The captains of presidios are authorized to grant and distribute house-lots and lands to the soldiers and citizens who may solicit them to FIX THEIR RESIDENCES ON." (Idem. Sec. 86, p. 42.)

The Royal Order of March 23, 1798, exempted, in certain cases, parties from full compliance with the provisions of "Article 81", for CONFIRMATION OF TITLES BY THE SUPREME BOARD OF SPAIN, but that the same might be left to that of MEXICO. (Idem. Sec. 87, p. 44.)

The decree of January 4, 1813, reduces vacant and Crown lands and other Common Lands to PRIVATE DOMINION; Suertes were ceded to the Defenders of the country and to the Citizens not Proprietors,—as follows, to-wit:—

"LAND REDUCED TO PRIVATE OWNERSHIP,—I. All the vacant or crown-lands and municipal property (propios and arbitrios) with wooded lands and lands not wooded, as well on the peninsula and adjacent islands as in THE PROVINCES BEYOND THE SEAS, except the exidos necessary for the pueblos, shall be reduced to private property, taking care that in those of propios and arbitrios their annual incomes be supplied by the most opportune means, which by the proposal of the respective PROVINCIAL DEPUTATIONS THE CORTES SHALL APPROVE." (Idem. Sec. 88, p. 45.)

"TITLES TO BE IN FEE,—2. In whatever manner the lands shall be distributed, it shall be in fee and with the right of inclosure, in order that their owners may inclose them (without prejudice to the sheep-walks (canadas), cross-ways, watering-places, and services), and enjoy them freely and exclusively, and to destine them to the use or cultivation which may best suit them; BUT THEY CANNOT EVER ENTAIL THEM,

OR PASS THEM AT ANY TIME INTO MORTMAIN." (Idem.)

"RESIDENTS PREFERRED,—3. In the alienation of said lands, the residents of THE PUEBLOS within the limits in which the lands exist, and the common people (comuneros) in the enjoyment of said lands, shall be preferred."

The foregoing decree was ABROGATED BY A ROYAL ORDER of the 8th of July, 1814. In the year 1818, the sale of the vacant and crown lands was again ordered, to pay the interest and the funding of the public debt; and afterwards, in 1819, rules were determined upon for the execution thereof. But in 1820, the constitutional regime inaugurated in 1812, being re-established, the distribution of the vacant crown-lands was again ordered by THE CORTES, on the 8th of November of that year; and other rules were issued from the same source, on the 29th of June, 1821, and on the same date in 1822. (Idem.)

SPANISH DOMINION IN CALIFORNIA: A. D. 1769-1824.

The three literary works devoted exclusively to the PROVINCE OF CALIFORNIA, in Spanish, that are extant, are,—"COSTANSO'S DIARIO", "THE MONTEREY EXTRACTO DE NOTICIAS (records of the first expeditions to San Diego and Monterey)",—"PALOV'S VIDA DE JUNIPERO SERRA," the latter, the standard history of the province down to 1784.

The name "CALIFORNIA" was first applied by the Spaniards between the years 1535 and 1539; was first called "LAS CALIFORNIAS", as it was supposed to be a group of islands,—the words are presumed to have been taken from an old romance, called, "THE SERGAS OF ESPLANDIAN", by Ordonez de Montcalvo, translator of "AMADIS OF GAUL", printed perhaps in 1510, and certainly in editions of 1519, 1521, and 1526 in Spanish, mentioned an island of California "ON THE RIGHT HAND OF THE INDIES,—VERY NEAR THE TERRESTRIAL PARADISE."

As far back as the year, 1542, the Spaniard, CABRILLO, found eight leagues north of Santa Monica, an "Indian town", called "PUEBLO DE LAS CANOAS", in the Santa Clara valley; four leagues north of Santa Rosa, he found two towns "in a region where there is a place still called "DOS PUEBLOS." (Bancroft: Vol. XIII, p. 73.)

In the year 1579, SEBASTIAN VISCAINO was sent to explore

anew and occupy for SPAIN the "CALIFORNIA ISLES". He sailed from Acapulco with a large force in three vessels, accompanied by four Francisian friars. He attempted to found a settlement at Santa Cruz, which he called La Paz, but it was shortly abandoned. He sailed again from Acapulco in May, 1602, with about 200 men, including three Carmelite friars, and arrived in San Diego Bay, November 10, 1603, where he remained ten days, and then set sail, and on the SIXTEENTH DAY OF DECEMBER, IN THE YEAR SIXTEEN HUNDRED AND THREE, arrived in the famoso, or excellent harbor, which in honor of THE VICEROY who had dispatched the expedition, was called "MONTEREY".

CABRILLO had done the same thing sixty years before. Says Bancroft:—"There is a perfect blank of one hundred and sixty-six years in the annals of what we call California,"—(1603 to 1769,)—when this region known as "Alta California", was taken possession of by SPAIN, whose pretended chief motive was "the missionary incentive to convert northern gentiles."

The expulsion of the Jesuits from Spain, in 1767, fixed the attention of the Spanish and Mexican authorities on this section of the world, where were situated the principal missions of the expelled order. California, by reason of the old mysterious charm hanging about the name and country, the strangely exalted value and importance which the Jesuits had always attached to the barren peninsula, and current tales of immense treasure hidden there by the Society, attracted a very large share of this attention. The explorations of the Russians on the Alaska coasts from 1741 to 1765, were also known to Spanish rulers, as well as the danger of Russian encroachment. (Idem. XIII, p. 113.)

JOSE DE GALVEZ set out from Mexico for San Blas, April 9, 1768, and shortly thereafter VICEROY CROIX received from KING CARLOS III, orders to the effect that in connection with other precautions against the Russians on the northwest coast, SAN DIEGO and MONTEREY SHOULD BE OCCUPIED AND FORTIFIED. The ROYAL ORDER was clear that SAN DIEGO and MONTEREY should be occupied; it was promptly and effectually executed. The whole matter was by the VICEROY (Croix,) turned over to GALVEZ, who had come to Mexico in 1765 as Visitador-General of New Spain. He departed this life in Spain, in 1789, as Minister of State; he had been invested by

the KING CARLOS III, with well-nigh absolute powers to investigate and reform the administration of the government of the colonies and provinces. He was subordinate only to the SOVEREIGN AUTHORITY OF SPAIN.

Captain Gaspar de Portola was ruling the country as Civil and Military Governor, when Galvez was so appointed. He had resolved on an expedition in four divisions, two by sea and two by land, to start separately, but all to meet at SAN DIEGO, and thence press on to MONTEREY. Portola commanded one division, Rivera, another; Fages, another; Galvez, the fourth.

The proposed occupation of the northern country was to be spiritual as well as military. JUNIPERO SERRA, the padre-president, also joined the expedition by land. Galvez and Junipero were united in opinion.

The four divisions were re-united in SAN DIEGO, one year after their starting out, to-wit,—JULY, 1769, and the MISSION OF SAN DIEGO was found by Junipero, July 16, 1769,—the first "mission" in California. (Idem.)

THE MISSION OF MONTEREY.

Says the historian:—"A week later, on the last day of MAY, (1770), the "San Antonio" hove in sight off Point Pinos; fires were lighted on shore for her guidance; and she entered the harbor by Cabrera's sailing directions." * * * "June 1st, the governor, friar, and lieutenant crossed over from Carmelo to welcome the new arrival, and the Order was given to transfer the camp back to the port of Monterey, about whose identity there was no longer any doubt; for close search along the shore revealed the little ravine with its pools of fresh water, the trees, and even the wide-spreading oak whose branches touched the water at high tide and under which Mass had been said by ASCENSION in 1602, all as in olden time except the crowds of friendly natives.

On the 3rd of JUNE, 1770, all were assembled on the beach, where an "enramada", or shelter of branches, had been erected and a cross made ready near the old oak. Water was blessed, the bells were rung, and the fiesta began by loud and oft-repeated peals. Then, Father Junipero donned his stole, and all on bended knee chanted the "VENITE CREATOR SPIRITUS", after which the cross was planted and blessed, and

the good friar sprinkled beach and fields with holy water, thus "putting to rout all infernal foes."

An image of the holy virgin, presented by Archbishop Lorenzana of Mexico, having been set up on the Altar, Mass was said by Serra amidst the thunder of cannon and the crack of musketry, followed by Salve to the image and a "TE DEUM LAUDAMUS." The church ceremonies ended. Portola proceeded to take formal possession IN THE NAME OF CARLOS III, by hoisting and saluting the royal flag of SPAIN, and going through the usual forms of pulling grass, throwing stones, and recording all in the prescribed ACTA. Finally the Officers and Friars ate together under the shade of trees near the shore, while the soldiers and others enjoyed their feast a little apart.

THUS WERE FORMALLY FOUNDED ON JUNE 3, 1770, THE MISSION AND PRESIDIO OF SAN CARLOS BORROMEO DE MONTEREY." (Idem.)

After the year, 1769, the region of California was known as "THE NEW ESTABLISHMENTS," or "LOS ESTABLECIEMIENTOS de SAN DIEGO y MONTEREY", or "THE NORTHERN MISSIONS". The name given by the earliest known natives, possibly, the AZTECS, to the place now known as MONTEREY, was "ACHASTA".

In accordance with previous orders of Governor Galvez, Captain Portola, as soon as the beginning was fairly made at MONTEREY, turned the local government of the new establishments over to Fages as Military Commandant, and then sailed away.

Friars began shortly to arrive, and the new Missions to be created, including SANTA CLARA and SAN FRANCISCO. Soldiers and Priests worked together in establishing the DOMINION OF SPAIN IN CALIFORNIA, and so "serving God". Both President of the Missionary Order (Junipero Serra), and Commandant of Military, were directly under the orders of THE VICEROY OF SPAIN IN MEXICO.

The frontier settlements of SAN DIEGO, MONTEREY, etc., were known historically, at this time, (1773), as "NEW ESTABLISHMENTS," "ESTABLISHMENTS OF SAN DIEGO AND MONTEREY," "MISSIONS OF MONTEREY," "NEW CALIFORNIA," "CALIFORNIA SUPERIOR," "ALTA CALIFORNIA," and "THE PENINSULA." San Diego became a regular presidio in 1774.

The "PRESIDIO OF SAN CARLOS de MONTEREY," on the Bay and Port of the same name, was established formally in 1774, and contained the military force to which was intrusted the protection of the Missions, "under a Commandant residing at the Presidio of Monterey:" each mission having a guard of from six to sixteen under a corporal or sergeant, while about twenty men garrisoned the Presidio under the Commandant's direct orders.

The civil and political authority was blended theoretically, for there is no record of the practical exercise of any such power in these earliest days, with the Military, and vested in the commandant, who was in civil matters responsible and subordinate to the governor of the provinces of the Californias, residing in Loreto, Mexico. There were at this time no colonists or settlers proper.

SPANISH MILITARY LAW IN CALIFORNIA.

The KING OF SPAIN had issued a Royal Order on September 10, 1772, on the subject of "PRESIDIOS", the last section of which reads as follows:—"I declare that the presidios of California are to continue for the present on their actual footing according to the provisions made by my VICEROY after the conquest and reduction had been extended to the port of MONTEREY; and on the supposition that he has provisionally assigned the annual sum of thirty-three thousand dollars for the needs and protection of that peninsula, I ORDER AND COMMAND that this sum be still paid at the end of each year from the royal treasury of Guadalajara, as has been done of late; and that my VICEROY sustain and aid by all possible means THE OLD AND NEW ESTABLISHMENTS of said PROVINCE, and inform me of all that he may deem conducive and useful to their progress, and to the extension of the new reductions of gentile Indians." (Idem. p. 207.)

"NEW REGULATIONS FOR CALIFORNIA."

The Junta de guerra y real hacienda,—(Board of War and Royal Exchequer,)—in May, 1773, placed in the hands of Juan Jose Echeveste, the work of preparing a "NEW REGULATION FOR CALIFORNIA." It provided a governor of both Californias, and a number of other military officials, from Cap-

tain to Commissioners. It was a mixture of piety and finance. VICEROY BUCARELI referred Echeveste's "NEW REGULATIONS" to his legal adviser, Areche, who approved it, and it therefore, went into force January 1, 1774. Governor Fages was removed and his office filled by Captain Rivera, who became California's new ruler of that province.

The following is a brief extract of said "REGULATIONS":— "The first object is, of course, the conversion of the natives; but next in importance is their gathering in MISSION TOWNS for purposes of civilization. These little towns may become great cities; hence the necessity of avoiding defects in the beginning, of care in the selection of sites, IN THE ASSIGNMENTS OF LANDS, laying out streets, etc.

The Commander is authorized to assign lands to communities, and also to such individuals as are disposed to work; but all must dwell in the pueblo or mission, and all grants must be made with due regard to the formalities of law. MISSIONS MAY BE CONVERTED INTO PUEBLOS WHEN SUFFICIENTLY ADVANCED, retaining the name of the patron saint. New missions may be founded by the commander, acting in accord with the president (of missions) whenever it can be done without risk to the OLD ONES." A complete diary of all events and measures was to be kept in a book, and literal copies forwarded to the SUPERIOR GOVERNMENT as often as opportunity occurred. All records and archives were to be carefully kept and preserved. (Idem. p. 216-217.)

MONTEREY, THE CAPITAL OF CALIFORNIA.

On the 16th of August, 1775, THE KING OF SPAIN issued a Royal Order that Governor Felipe de Neve make his official residence at the CITY OF MONTEREY as the Capital of the Province of Upper California. (Idem, XIII, pp. 307-9.) A second Royal Order of April, 1776, directed the change, from LORETO to MONTEREY, of residence to be made immediately. The new establishments were recognized by CARLOS III, as more important than the old. In six years the child had outgrown its parent. MONTEREY was to be Capital of the Provinces of the Californias as it had always been of "California Setentrional." So that in 1776, Bucareli was Viceroy, and Neve was Governor, both acting under royal authority.

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The "PRESIDIO OF SAN CARLOS de MONTEREY," on the Bay and Port of the same name, was established formally in 1774, and contained the military force to which was intrusted the protection of the Missions, "under a Commandant residing at the Presidio of Monterey:" each mission having a guard of from six to sixteen under a corporal or sergeant, while about twenty men garrisoned the Presidio under the Commandant's direct orders.

The civil and political authority was blended theoretically, for there is no record of the practical exercise of any such power in these earliest days, with the Military, and vested in the commandant, who was in civil matters responsible and subordinate to the governor of the provinces of the Californias, residing in Loreto, Mexico. There were at this time no colonists or settlers proper.

SPANISH MILITARY LAW IN CALIFORNIA.

The KING OF SPAIN had issued a Royal Order on September 10, 1772, on the subject of "PRESIDIOS", the last section of which reads as follows:—"I declare that the presidios of California are to continue for the present on their actual footing according to the provisions made by my VICEROY after the conquest and reduction had been extended to the port of MONTEREY; and on the supposition that he has provisionally assigned the annual sum of thirty-three thousand dollars for the needs and protection of that peninsula, I ORDER AND COMMAND that this sum be still paid at the end of each year from the royal treasury of Guadalajara, as has been done of late; and that my VICEROY sustain and aid by all possible means THE OLD AND NEW ESTABLISHMENTS of said PROVINCE, and inform me of all that he may deem conducive and useful to their progress, and to the extension of the new reductions of gentile Indians." (Idem. p. 207.)

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Neve), to move the presidio of Monterey to the river since called Salinas, chiefly because of the insufficient supply of water at the original site. The Viceroy approved the measure; BUT THE ROYAL ORDERS TO NEVE EXPRESSLY FORBADE THE REMOVAL, declaring that the presidio must be maintained where it was at any cost, for the protection of the port. (idem.)

THE PUEBLO OF MONTEREY.

Just when the Pueblo of Monterey was established—(conceded in the pleadings and final decree herein)—it is impossible to state, as the original grant and the records of the same were, at an early date either destroyed or stolen, presumably, by parties interested in their loss; but a copy of the original "ACT OF TERRITORIAL DEPUTATION" marking its boundaries, as copied from the Mexican Legislative Records, will be found in the record herein, pp. 21-22.

THE CIVIL LAWS OF SPAIN AND ITS COLONIES.

When the prefatory Act establishing "THE COUNCIL OF THE INDIES," went into effect, in the year 1682, this Council had sole and supreme jurisdiction of all matters relating to Spain's colonies,—subject to the veto of the SOVEREIGN,—and possessions in —"Our Indies, Islands, and Continent of the Northern and Southern Oceans", "now discovered, or which may hereafter be discovered, and over the transactions there arising and pending; and that the same may WITH OUR COUNCIL, and for the good government and administration of justice therein, ordain and make laws, regulations, ordinances, and provisions, general and particular."

(White's New Recopilacion; Vol. 2, p. 24-27.)

The Viceroys and Presidents were to exercise local, territorial jurisdiction in matters of civil government; the Captains-General, in those of war, and were assisted in some matters by Royal Tribunals or "Audiences", (Idem, pp. 32-35.) The Viceroys were to be presidents of their respective "audiences",—that of Peru, at Lima, that of New Spain, at Mexico, etc. (idem, p. 39.); they were also governors of their respective districts, and of the provinces subordinate thereto, (idem, p. 40.)—"THEY RULE AND GOVERN THE SAME IN OUR NAME."

Viceroys, alone, were permitted to allow new discoveries of lands to be made, and "to grant licenses within their respective jurisdictions, to form such settlements as may be proper, observing the laws contained in this book; provided that such settlements being made, THEY IMMEDIATELY TRANSMIT TO US INFORMATION OF WHAT THEY SHALL HAVE DONE." (idem, p. 41.)

THE FOUNDING OF CITIES.

The law of 1682, above alluded to, (translated by White), reads:— "If the situation of the land be adapted to the founding of any town to be peopled by Spaniards, with a council of ordinary Alcaldos and Regidores; and, if there be persons who will contract for their settlement, the agreement shall be made upon the following conditions; that, within the prescribed time, it shall comprise at least thirty heads of families, each of whom to possess a house, ten breeding cows," etc. etc. "he shall, moreover, appoint a priest to administer sacraments," etc. "he shall provide the church with ornaments and articles necessary for divine worship,"—"shall give bond to perform same," * * * "and if he fail in fulfilling his agreement, he will lose all that he may have built, worked, or repaired, which shall be applied to OUR ROYAL PATRIMONY, and incur the forfeiture of one thousand ounces of gold to OUR CHAMBER; and if he should fulfill his obligations, there shall be granted to him FOUR SQUARE LEAGUES of territory, either in a square or lengthwise, according to the quality of the land, in such manner, that, when located and surveyed, the four leagues shall be a quadrangle;" etc. (idem, 44.)

The lands granted were to be in proportion to the number of heads of families specified by THE GOVERNMENT, and upon the same conditions. The founder was to enter into agreement with each person enlisted for the settlement; settlers, authorized to elect alcaldes.

The territory was to be divided between the person who made the Agreement and the Settlers, as follows:—

"They shall, in the first place, lay out what shall be necessary for the site of the town and sufficient liberties, (exidos,) and abundant pasture for the cattle owned by the inhabitants, and as much besides for THAT WHICH SHALL BELONG TO THE TOWN (propios). The balance of the tract shall then be divided into four parts; one to be selected by the person obli-

gated to form the settlement, and the remaining three parts to be divided in equal portions among the settlers." (idem, p. 46.)

"THE LOTS shall be distributed among the SETTLERS by lot, beginning with those adjoining the main square, AND THE REMAINDER SHALL BE RESERVED TO US, to give, as rewards, to new settlers, or otherwise, according to OUR WILL; and WE COMMAND that a plan of the settlement be always made out; * * * The reservations (exidos) shall be at such a distance that, in case the town should increase, there may still be a sufficient space for THE AMUSEMENT OF THE PEOPLE AND FOR CATTLE TO GO AT LARGE WITHOUT DOING ANY DAMAGE." (idem, p. 47.)

From these lands the viceroys shall separate those which appear fit for RESERVATIONS (propios) for those settlements which have none"; "the governors of the district may extend the term", for completion of the settlement; "THE VICEROYS AND PRESIDENTS SHALL, IN OUR NAME, grant lots, lands, and waters;" (idem, p. 50.)

OWNERS OF LANDS, HAVING A LEGAL TITLE THERETO, WERE TO BE MAINTAINED IN THEIR POSSESSION OF THE SAME, BUT ALL OTHERS WERE TO BE RESTORED TO THE KING. (idem, p. 52.)

Viceroys and president-governors were empowered to revoke grants of land made by the Councils of Cities, UNLESS SUCH GRANTS WERE CONFIRMED BY THE KING.

"Viceroys and Governors being thereto authorized, shall lay out for each town or village which shall be newly founded and peopled, the lands and lots which they may want, and and same shall be granted to them as RESERVATIONS (propios) without prejudice to third persons. They shall transmit TO US information of what they shall have laid out, THAT WE MAY ORDER THE SAME TO BE CONFIRMED." (idem, p. 55.)

Pastures, Mountains, Waters, and Limits, were to be COMMON; so were wild-fruits. (idem, p. 56.) Strangers were not allowed to trade in seaport towns. (idem, p. 60-1.)

THE ROYAL ORDER OF OCTOBER 15, 1754.

We return, briefly, to the Royal Order of October 15, 1754, above alluded to, as next in order in this historical research. Section XI provides,—

"These Audiences shall be a COURT of APPEAL for trying the decisions and sentences of the sub-delegates pronounced by them in any suit about the SALE OR COMPOSITION OF ROYAL LANDS, the information lodged concerning them and their survey and valuation"; Section XII provides, in part, that, "in the distant provinces of the Audiences, OR WHERE SEA INTERVENES, * * confirmations shall be issued by their Governors, with the advice of the Officiales Reales, (KING'S FISCAL MINISTERS,) and the Lieutenant General, where he may be stationed."

"INTENDANTS OF ARMY AND PROVINCE."

Another subsequent Royal Regulation established the office of "Intendants of Army and Province", who were to govern the towns and inhabitants of NEW SPAIN; by Article 81 of which it was provided, in part, as follows:—

"Article 81. The Intendants shall also be the exclusive judges of the causes and questions that may arise in the district of these provinces, ABOUT THE SALE, COMPOSITION, AND GRANT OF ROYAL LANDS, and of seignory, it being required of these possessors and of those who pretend to new grants of them, to produce their rights and institute their claims before the same intendants, so that these matters being legally prepared in conjunction with a promoter of my Royal Treasury, whom they may appoint, may be decided upon, the opinion of their ordinary assessor being heard, and they may admit appeals to the superior junta de hacienda", etc. They could also "DISTRIBUTE" "the royal lands, without prejudice to such commons, as, by the provisions of the Law No. 8, ought to belong to each town or corporation." (idem, p. 70.)

RECOPILACION OF SPANISH LAWS, DOWN TO 1804: (KING CARLOS IV.)

LIBER III; Title 5; LAW I:—provides that ROYAL GRANTS cannot be revoked, without some default of the grantee; AND DESCEND TO HIS GRANTEE.

LIBER VII; Title XVI, treating of MUNICIPAL DOMAINS, ("propios",) reads as follows,—(translated by White),—

"LAW 1,—VOL. 3. p. 382. OUR WILL AND PLEASURE IS, THAT THE CITIES, TOWNS AND VILLAGES SHALL RETAIN THEIR RIGHTS, REVENUES AND MUNICIPAL DOMAINS, (propios), AND THAT NO GRANTS BE MADE OF THEM; WHEREFORE, WE COMMAND THAT ALL GRANTS OF THE SAME, OR ANY PART THEREOF, WHICH WE MAY MAKE TO ANY PERSON, BE OF NO VALUE WHATEVER. (idem, p. 99.)

"LAW 2,—VOL. 3, p. 382. Whereas Our Pleasure is, that the cities, towns and villages, be relieved, with regard to their MUNICIPAL DOMAINS, (propios), WE COMMAND that the stores, shops, granaries, and the lots within their squares and market spaces, WHICH YIELD RENTS, OR WHICH THEY MAY RENT, AND WHICH WERE SET APART AS THE MUNICIPAL DOMAINS of said cities, towns and villages, as also the offices appertaining thereto, or which are to be granted to said cities, towns and villages, and from which rents may accrue to the same, which may have been entered and unjustly occupied by any person, or by virtue of any power which they may possess, without paying any equivalent or rent for said lots, BE FORTHWITH RETURNED TO SAID CITIES, TOWNS AND VILLAGES. And if any charters or grants of this property have been made by THE KINGS, OUR ANCESTORS, OR BY OURSELVES, WE FURTHER COMMAND, that the same be of no value, and that they be neither obeyed nor fulfilled; and that OUR JUSTICES shall incur no penalty whatever for not fulfilling them, athough they may contain clauses contrary to this Order." (idem.)

LAW 4. "Whenever the estates, domains and revenues of the cities, towns and villages shall be about being rented, WE COMMAND, that, a day be fixed by the council for A PUBLIC RENTING OF THE SAME, when they shall be so rented and adjudged, AFTER BEING PUBLICLY OFFERED DURING NINE DAYS, at the end of which the day for adjudication shall be fixed. The adjudication shall be to the highest bidder, provided he be not one of the persons disqualified by the provisions of Law 7, Title 9, of this book; and the persons to whom adjudication shall be made shall make oath that such adjudication is not for the benefit of any person so disqualified, but for his own; under penalty to those who shall take such adjudication in

behalf of the persons disqualified as above, of the punishment provided by the law above cited, and of said renting being made at their own risk, in the manner above set forth." (idem.)

* * * * * * * *

IT WILL, THEREFORE, BE SEEN FROM THE FOREGOING EXTRACTS OF SPANISH LAWS, THAT, THE "LANDLORD" IN WHOM VESTED THE TITLE AND JURISDICTION IN, TO AND OVER SAID PUEBLO LANDS,—THE RENTER,—WAS THE SUPREME, SOVEREIGN POWER OF SPAIN.—THE KING AND THE KING, ALONE! THESE LAWS WERE NEVER REPEALED BY MEXICO. (seq.)

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UNDER FERDINAND VII; LAST JURISDICTION OF SPAIN.

In the year, 1814, FERDINAND VII, who had been deposed as KING, by the EMPEROR NAPOLEON, from the throne of Spain, was restored thereto, and on the 28th of June of that year issued a ROYAL ORDER OR DECREE, abolishing the department of state called "GOVERNMENT OF POSSESSIONS BEYOND SEA", and restored the former title of "UNIVERSAL MINISTRY OF THE INDIES", or "CAMERA de INDIES", with the powers it possessed in May, 1808, but to consist of only a president and three togadas; of which royal decree all colonial possessions were at once notified. (idem, pp. 156-74.)

On September 18, 1815, the same KING abolished, by Royal Order, the "Universal Ministry of the Indies", and commanded its business to be "distributed among the departments, according to its nature, in the same manner as was directed by my August Father, by decree of the 25th, of April, 1790."

In the year 1828, the same KING signed the treaty between the UNITED STATES OF AMERICA and SPAIN, for the cession of the province of Florida: on the 25th of November of that year, SENOR GOVERNOR NICOLAS GARRIDO of East Florida province, in a communication to the Duke of Alagon, "grandee of Spain of the first class and Captain of the King's body-guard", etc., uses the following language:—

"respecting the concessions of lands made by this government; * * * The concessions of a great extent of land for the rearing and pasture of cattle constituted no more than THE USUFRUCT OF IT, FOR THE TIME AGREED UPON, but the gran-

tee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation upon which to found it, and, consequently the land does not go out of the CLASS OF PUBLIC LANDS, SINCE IT IS THE SAME AS IF IT WAS HELD ON RENT." (idem, p. 287.)

PUEBLOS, UNDER SPANISH DOMINION, IN CALIFORNIA.

The "NEW REGLAMENTO" of Spain, for the government of the Province of California, went into effect in the year 1781, receiving the approval of KING CARLOS III, of Spain, on October 24th, but dating back to 1779. It made provision for TWO PUEBLOS, one already at SAN JOSE, and the other on the Rio Porciuncula and called "NEUSTRA SENORA de LOS ANGELES".

"Says Bancroft, (Hist. Pac. Stat. Vol. XIII, pp. 333-344, Chap. XVI.),—"SECTION XIV of the regulation deals with the new (?) and important subject of PUEBLOS and COLONIZATION. As the FOUNDATION OF PUEBLO LAND-TITLES this section has played an important part in the subsequent litigations of California Courts, and has often been republished and translated." (idem, p. 336.)

The clauses relating to the distribution of lands are as follows:—"The solares (house-lots) granted to the new settlers must be designated by THE GOVERNMENT in respect to location and extent according to the ground on which THE NEW PUEBLOS are established, so that plaza and streets be formed as prescribed BY THE LAWS OF THE KINGDOM, conformably to which there shall also be designated for the PUEBLO a suitable egido,—(common or vacant suburbs, to be divided into additional house-lots and distributed to new settlers if required,) and dehesas (outside pasture-grounds used in common by the settlers) with the sowing-lands needed for propios, (lands rented for a revenue to pay municipal expenses). Each suerte (planting-lot) of land, whether irrigable or depending on rainfall, must be 200 varas long and wide, this being the area generally occupied by a fanega, a bushel and a half, of maize in sowing.

The distribution of suertes, which like that of solares, MUST BE MADE IN THE KING'S NAME, will be made by the government with equality and with proportion to the irrigable land, so that, after making the corresponding demarcation

and after reserving as baldios, or vacant, one-fourth of the number which results from reckoning the number of settlers, they (suertes) shall be distributed, if there are enough of them, at the rate of two suertes of irrigable land to each settler and two more of dry; and of the realengas (royal-lands including the lots left vacant as above) there shall be set apart such as may be deemed necessary for the public's propios (municipal lands as above), and from the rest grants shall be made by the governor, IN THE NAME OF HIS MAJESTY, to such as may come to settle later, especially to discharged soldiers," etc. (idem.)

Under the heading of "PUEBLOS" (1791-1800), Bancroft says:—"As soon as the territory (of California) was occupied by Spain in 1769, THE ABSOLUTE TITLE VESTED IN THE KING. No individual ownership of lands, BUT ONLY USUFRUCTUARY TITLES OF VARIOUS GRADES, existed in California in Spanish times. The King, however, was actually in possession of only the ground on which the presidios stood and such adjoining lands as were needed in connection with the royal service. The natives were recognized as the owners, UNDER THE KING, of all the territory needed for their subsistence; but the civilizing process to which they were to be subjected would greatly reduce the area from that occupied, in their savage state; and thus there was no prospective legal hindrance to the establishment of Spanish Settlements. The general laws of Spain provided for such establishments, and the assignment to each of lands to the extent of four square leagues. (Recopilacion de Indies, lib. IV. Tit. V. leg. VI).

Meanwhile neither the Missions nor the Friars nor the Franciscan Order, nor the Church owned any lands whatever. The Missionaries had the use of such lands as they needed for their object, which was to prepare the Indians to take possession as individuals of the lands they now held as Communities. When this was accomplished, AND THE MISSIONS HAD BECOME PUEBLOS, the houses of worship would naturally become the property of the Church, and the friars would move on to new spiritual conquests.

EACH MISSION AND EACH PRESIDIO WAS AT THE PROPER TIME TO BECOME A PUEBLO: other pueblos were expected to be founded from time to time; and four square leagues of land was the area to be assigned under ordinary circumstances to each; but the fixing of boundaries was tacitly left until the

future increase in the number of establishments should render it a necessity, NOTHING IN THE MEANTIME BEING ALLOWED TO INTERFERE WITH THE AREA TO WHICH EACH PUEBLO WOULD BE ENTITLED, though the Missions in their temporary occupation were not restricted." (Vol. XIII, pp. 607-09.)

TWO WAYS OF CREATING PUEBLOS: SPANISH CONSTITUTION OF 1812.

There were two methods of establishing Pueblos or towns: 1: BY VIRTUE OF A CAPITULATION OR AGREEMENT ENTERED INTO, between a given person and the GOVERNMENT, whereby THE CONTRACTOR was to establish a town upon the conditions established by law. According to the Ordinances 88 and 89, of PHILIP II, which are embodied in Law 6, Book 4, Title 5, of the "RECOPILACION de LAS INDIES", the Contractor was to furnish at least, thirty inhabitants (vecinas), and each of them to build a house, and to furnish a certain number of stock; and if he complied with all the conditions, he was to have assigned him four square leagues of land in a square or oblong form according to the condition of the land. The limits of the town were not to be within five leagues of any other town of Spaniards; nor to do any damage to any Indian town or to any private person. Ordinance 100 of Philip II, which is Law 7 of said book and title, modifies the foregoing by permitting the contractor to furnish not less than ten inhabitants.

DIVISION OF THE LAND: Ordinance 90, or Law 7, book 4, title 7, of said Recopilacion, designates the manner in which the contractor shall divide the land, as follows: FIRST, there shall be measured off what shall be necessary for the house-lots (solares) and commons (exidos); then beyond and adjoining the exidos was to be designated the dehesa or COMMUNITY LANDS for the pasture of the stock belonging to the inhabitants of the town. The "EXIDOS" were the COMMONS OR PLACE OF RECREATION FOR THE INHABITANTS. Next was to be measured the "PROPIOS", WHICH WERE LANDS TO BE RENTED OUT BY THE AYUNTAMIENTO, OR TOWN COUNCIL,—RENTED, NOT SOLD,—THE PROCEEDS OF WHICH WERE USED TO DEFRAY THE MUNICIPAL EXPENSES. The remainder of the land was to be divided into four parts; one part was given to the contractor or founder of the town, and the other three parts were divided into suerte lots

equally among the other SETTLERS. By Ordinance 103, which is Law 9, book 4, title 5, peonias and cavallerias of land were to be given to the SETTLERS. (Hall's Mexican Law, Ch. 7. p. 49.)

2: TOWNS ESTABLISHED BY THE SOVEREIGN, DIRECT. Towns, or pueblos, were also established by the local provincial government, under direct sanction of the KING OF SPAIN. The governor of the province examined the locations as to the conveniences and advantages which would arise from the establishment of towns or pueblos in certain places; and he determined whether the same to be established should be a city, villa, or place (plaza); and in conformity with what he declared, the municipal government was formed. (Law 2, book 4, title 7.)

In the towns so established, after the house-lots, exidos, dehesas, and propios were measured off, the rest was divided into suertes, or lands for cultivation. The suertes were in number equal to the house-lots or more, so that each poblador or founder received a suerte; and if there were irrigable lands, they were also divided into suertes and given to the pobladors. THE REMAINDER OF THE SUERTES REMAINED FOR THE KING TO GRANT TO OTHER PERSONS WHO MIGHT THINK PROPER TO SETTLE IN SAID TOWNS.

EXIDOS. LAW 13, book 4, title 7, required the exidos to be measured at such a distance from the ground for house-lots, that the growth of the town may leave sufficient space in the exidos for recreation. When all the ground for house-lots was occupied, house-lots were sold out of the exidos, as in no other way could the town extend. (Hall; idem.)

FEE OF PUEBLO LANDS, IN THE SOVEREIGN.

Says Hall (Idem: p. 53):—"THE FEE OF THE LAND EM-"BRACED WITHIN THE LIMITS OF PUEBLOS CONTINUED TO "REMAIN IN THE SOVEREIGN, AND NEVER IN THE PUEBLO AS "A CORPORATE BODY. UNDER THE JURISPRUDENCE OF SPAIN, NO "LANDS WITHIN A PUEBLO WERE EVER SOLD TO A PRIVATE INDI-"VIDUAL, EXCEPT THE HOUSELOTS (SOLARES), SUERTES, PEONIAS, "AND CAVALLERIAS WHICH WERE GIVEN TO THE SETTLERS OR POBLA-"DORS FOR CULTIVATION. These were to be possessed and "worked continuously for four years before the grantee could "dispose of them as his own, as provided in LAW 1, BOOK 4, "TITLE 12 of THE LAWS OF THE INDIES. ALL THE OTHER

"PUEBLO LANDS WERE HELD BY THE SOVEREIGN "FOR THE BENEFIT OF THE INHABITANTS THEREOF. "The propios were lands that were rented out in order to pro- "duce a revenue to assist in the support of the municipal gov- "ernment. The leases of these lands were sold by the town "council (ayuntamiento) at public auction to the highest "bidder, as provided in Law 3, book 4, title 13, of said laws. "The exidos were the Commons or grounds for recreation. "The Dehesas were the pastures and woodlands for the BENE- "FIT OF ALL THE COMMUNITY; according to law 5, book 4, title 12, "the distribution of these lands among THE SETTLERS was to be "made by the viceroy or governors, with the consent of the "ayuntamiento, or cabildo, which is the same as town council; "all the proceedings of that body were transmitted annually "TO THE KING FOR APPROVAL."

SPANISH CONSTITUTION OF 1812: AYUNTAMIENTOS.

Spain formed a constitution by its Cortes, on March 18, 1812. Article 309 thereof, FOR THE GOVERNMENT OF PUEBLOS, provided that, there should be an AYUNTAMIENTO composed of the alcalde or alcaldes, councilmen, and city attorney (pro curador sindico.) When the political chief was present he was entitled to preside over the council; when not present, the alcalde was to preside.

Articles 325 and 326 provided that there should be a PROVINCIAL DEPUTATION, to be presided over by the political chief, and that it should be composed of the president, the intendent, and seven individuals to be elected in the manner which shall be established. This "provincial deputation" was an appellate body to the ayuntamiento.

POWER TO SELL PUEBLO LANDS: U. S. COURT DECISIONS.

The following extract appears in Hall's Mexican Law, page 55,—

"In the American courts, the question as to where the "power to sell pueblo lands was vested, was not an easy one "for solution. This was not altogether without reason. THE "CONSTITUTION OF SPAIN OF 1812, THE LAWS UNDER IT, AND THE "FEDERAL LAWS OF MEXICO SEEM TO BE SILENT UPON THE QUES-

"TION. THE FACT IS, THE LAWS OF THE INDIES "HEREIN REFERRED TO HAVE NEVER BEEN "REPEALED. The power seemed to be a joint one, "requiring the action of the ayuntamiento, and that "of the highest political power of the province, or "that of the viceroy, president of the andiencia, or "KING, under Spanish rule. The practice was for the person "wishing a GRANT OF A LOT, to present a petition to the ayunta- "miento, soliciting a given lot, accurately described. Notices "of the same were posted at the court house (juzgado), "churches, and other public places for a certain period, in order "that if any person was aware of any objections to the grant- "ing of said lot, they could present the same to the ayunta- "miento. There being no objection, the grant was made in "accordance with the ordinances established by the ayunta- "miento, and approved by the governor of the province; or "according to the instructions issued by the governor to that "body. Sometimes they were signed by the president of the "ayuntamiento. The records of each ayuntamiento will show "the authority for their method of issuing titles. Those is- "sued in the capital of Mexico were issued by the ayunta- "miento and approved by the viceroy, or president of the "audiencia. Of late years, UNDER MEXICAN REGULATIONS, THE "TITLES IN THE CAPITAL WERE EXECUTED BY A COMMISSION OF "THE TREASURY. There existed no general law or DECREE OF "THE SOVEREIGN designating the manner of issuing such titles."

Under the heading "UNDER MEXICAN AUTHORITY", (idem, p. 56), he says:—

"After the independence of Mexico, (1824), THE STATES be- "came to a certain extent SOVEREIGN POWERS, and the RIGHTS AND "JURISDICTION OF THE CROWN OF SPAIN OVER PUEBLOS BECAME "VESTED IN THE STATES RESPECTIVELY."

(To show that the author is incorrect in this sweeping statement, reference is here made to ARTICLES 3, 5, and 7, CONSTITUTIVE ACTS, MEXICAN FEDERATION, and CONSTITUTION OF THE UNITED MEXICAN STATES (Art. 50, Secs. 6, and 30)—(White's New Recopilacion, Vol. 1, pp. 393-5)—in re "TERRITORIES OF CALIFORNIAS," hereafter given in this brief. (See, particularly, list of "States" and "Territories" of Mexican Republic; seq. also, Decrees of August 18, 1824, and November 21, 1828,—Rockwell's Span. and Mex. Laws, pp. 451-5.) Hall continues,—

"Each STATE enacted its own laws pertaining to its pueblo. "The power was given to the ayuntamientos, and to alcaldes "where no ayuntamiento existed."—(THAT IS, IN THE SALE OF TOWN LOTS ONLY, IN SAID STATE.")

The author's statement above that "sovereign powers" theretofore belonging to the "CROWN OF SPAIN", passed to the States comprising the "United Mexican States", respectively, and NOT TO THE MEXICAN REPUBLIC, ITSELF, PER SE, ON ITS CREATION AS AN INDEPENDENT NATION, SUCCEEDING AS SUCH TO ALL THE TITLES AND RIGHTS THERETOFORE BELONGING TO THE THRONE OF SPAIN,—WITHOUT CITING AN AUTHORITY,—IS ENTIRELY GRATUITOUS AND CONTRARY TO THE FACT, He simply follows the illogical and unconstitutional rulings of his state—California—supreme court, as given in various cases, theretofore, and in line with the final decree upon and from which this case is brought to this Court, and is also contradictory, of what he had previously written, cited above, to-wit,—"ALL THE OTHER PUEBLO LANDS WERE HELD BY THE SOVEREIGN FOR THE BENEFIT OF THE INHABITANTS THEREOF",—that is to say, all pueblo lands, save houselots (solares), suertes, peonias, and cavallerias: with these four exceptions, THE FEE IN THEM REMAINED IN THE MEXICAN NATION.

The fee title passed from the King of Spain, as sovereign, to, successively, "The Mexican Empire", under Iturbide, and the "Federal Republic" or "Nation" called "THE UNITED MEXICAN STATES", which was self-created as a political entity, on the 4th day of October, in the year 1824, and thereby, as such sovereign nation, succeeded to all the rights, titles and privileges pertaining to such Spanish sovereignty in, on, over and upon all properties, real, personal and mixed, and subject to all trusts created by said former sovereignty, that had formerly belonged to that sovereignty,—(see, "Constitution of Mexican United States", seq.,)—precisely as did the United States of America, under the treaty of Guadalupe-Hidalgo and the protocol thereof relative to pueblo lands in the Mexican territories ceded under them, as above stated.

In fact, under the Mexican regime, houselots only were sold, prior to the year 1856. With the legislation relative to the pueblo lands in Mexico, after the year 1846, the date of the conquest by the United States, when the "Territory of California",—not as a "State" of the Mexican Republic,—passed

under the jurisdiction of the United States of America, and the former nation's special work for the desamortizacion and nationalization of the so-called, "Community Lands" of civil and ecclesiastical corporations, we have naught to do, save to remark that before and after the independence of the Mexican Nation, the "propios", "exidos", and "dehesas", WERE NEVER SOLD UNTIL THE ENACTMENT OF THE LAW OF JUNE 25, 1856, BY THE MEXICAN CONGRESS;—WHICH LAW ITSELF RIGHTFULLY ASSUMES NATIONAL SOVEREIGNTY OVER SUCH LANDS, BY ITS VERY ENACTMENT, AND PROVES, THEREFORE, THAT THE FEE TITLE HAD PASSED, IN PUBLIC PUEBLO LANDS, FROM THE SOVEREIGN OF SPAIN DIRECT TO THE SOVEREIGN MEXICAN REPUBLIC, AND NOT TO THE "TERRITORY" OR "PROVINCE" OF "CALIFORNIA" OF SAID NATION, THERE BEING NO "STATE" OF CALIFORNIA IN "THE UNITED MEXICAN STATES." (seq.)

NOR WERE THESE PUBLIC OR PUEBLO LANDS OF THE CITY OF MONTEREY—AS LOCATED IN THE PROVINCE OF CALIFORNIA,—A CONQUERED AND CEDED "TERRITORIO" OF THE MEXICAN REPUBLIC,—AFTER THEY HAD BEEN SO ACQUIRED FROM IT BY THE SOVEREIGN NATION,—"THE UNITED STATES OF AMERICA",—EVER GRANTED OR IN ANY WAY SURRENDERED BY THE LATTER NATION, OR JURISDICTION OVER THEM, GIVEN IN ANY WAY TO EITHER THE SAID "TERRITORIO OF CALIFORNIA", WHEN A MILITARY PROVINCE OF THE UNITED STATES, OR TO THAT NATION'S CREATION, THE SAID SO-CALLED "SOVEREIGN STATE" OF CALIFORNIA; BUT, ON THE CONTRARY, THEY WERE GRANTED AND CONVEYED BY UNITED STATES LETTERS-PATENT DIRECT TO SAID CITY OF MONTEREY, PLAINTIFF IN ERROR, HEREIN, ON THE NINETEENTH DAY OF NOVEMBER IN THE YEAR EIGHTEEN HUNDRED AND NINETY-ONE (Record, pp. 30-34) ;THUS CONVEYING TO SAID CITY ITS OWN SOVEREIGN TITLE IN FEE,—WHICH TITLE, ACCORDING TO THE RULING OF THIS COURT IN "MEADER-VS-NORTON," 11 WALL. 455, (A. D. 1870.) REMAINED IN THE UNITED STATES OF AMERICA UNTIL THE PATENT ISSUED, WHEREUPON "THE LEGAL TITLE PASSED TO THE PATENTEE". (18 Cal. 26-28, and 571; 87 Cal. 333-4; 19 How. 365; 21 How. 488.)

WHERE, THEN, DID THE "SOVEREIGN STATE" OF CALIFORNIA GET ITS TITLE TO, OR JURISDICTION OVER "THE PUEBLO LANDS OF THE CITY OF MONTEREY"?

IF THE MEXICAN "TERRITORY" OF "UPPER CALIFORNIA" DID NOT HAVE THE PARAMOUNT TITLE TO THESE PUEBLO LANDS, HOW DID THE "SUCCEEDING SOVEREIGN STATE" OF CALIFORNIA OBTAIN

IT? THAT TITLE BEING IN THE MEXICAN NATION, CONCEDEDLY BY THE FINAL JUDGMENT ITSELF, HEREIN APPEALED FROM, IT CERTAINLY PASSED DIRECT TO THE UNITED STATES OF AMERICA BY VIRTUE OF THE TREATY OF GUADALUPE-HIDALGO; AND THIS PRINCIPLE HAS ALREADY BEEN REPEATEDLY AVOWED BY THIS COURT: THERE ARE BUT TWO WAYS OF OBTAINING TITLE TO LAND FROM THE UNITED STATES OF AMERICA, TO-WIT;—LEGISLATIVE GRANT AND LETTERS-PATENT.

That the Mexican Republic asserted sovereign jurisdiction over pueblo lands, IN "TERRITORIES," is shown in the first of the Colonization Acts, passed in its first congress, on August 18, 1824; clauses 2 pertaining to "NATIONAL LANDS", is as follows:—"The objects of this law are those national "lands which are neither private property nor belong to any "corporation or town (pueblo), and can therefore be colon-"ized,"—thus recognizing the title in fee or in trust, as being in said pueblos, precisely as it had theretofore existed under Spanish rule:—that is to say, THE PUEBLO LANDS IN ITS "TERRITORIES," WERE STILL, UNDER MEXICAN RULE, HELD AS A TRUST IN ACCORDANCE WITH SPANISH INTERPRETATION OF THE LAWS OF THE INDIES,—THE SOVEREIGN NATION HOLDING THE RIGHT OF LANDLORD WITH TENANT UNDER A PERPETUAL LEASE OR TRUST. (Hall, p. 71; Rockwell, Vol. 1, pp. 451-5; Colonization Law in Mexican Territories: Seq.)

SPANISH OR MEXICAN LAND TITLES IN THE UNITED STATES: DECISIONS.

"AN ACT FOR THE FINAL ADJUSTMENT OF PRI-"VATE LAND CLAIMS IN THE STATES OF FLORIDA, "LOUISIANA, AND MISSOURI," APPROVED JUNE 22, 1860, (12 STAT. 85.) provides for the presenting all such claims in Florida and Louisiana to the registers and receivers of the several U. S. Landoffices, within their respective districts, and in Missouri to the recorder of land titles for the city of St. Louis, and for a report on the claims to THE COMMISSIONER OF THE GENERAL LAND OFFICE, AND THROUGH HIM TO CONGRESS. IN ALL SUCH CASES CONGRESS RESERVED THE RIGHT TO CONFIRM OR REJECT THE CLAIM.

The Act intended to provide a suit in the nature of ejectment against the United States whether out of possession or in possession, and to remove the bar of the statute of limita-

tions in favor of the United States,—it having "a constructive possession for the defendant." (SCULL-vs-UNITED STATES, 98 U. S. 410.)

In "UNITED STATES-vs-PEROT", 98 U. S. 428, this Court says, in effect, where a country has been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition. "ITS LAWS ARE NOT DEEMED FOREIGN LAWS: FOR AS TO THAT PORTION OF OUR TERRITORY THEY ARE DOMESTIC LAWS: AND WE TAKE JUDICIAL NOTICE OF THEM." FREMONT-vs-UNITED STATES, 17 HOW. 542, 557.

In "TRENIER-vs-STEWART", 101 U. S. 797, (A. D. 1879.) this Court says:—"Two propositions arising o[illegible] of the facts "in the case cannot well be controverted: 1: That if both "titles depended exclusively for their validity upon the action "of Congress, the defendant's must prevail, the rule being "that he who first obtains the title and not he who first ap- "plied for it has the better right. McCABE-WORTHING- "TON, 16 HOW. 8 6.

"2: THAT IF THE TITLE OF THE ORIGINAL DONEE WAS COM- "PLETE WHEN THE PROVINCE WAS CEDED TO THE UNITED STATES, "IT IS THE SUPREME TITLE, AND IS PROTECTED BY THE "TREATY OF CESSION: to which a third proposition may "be added,—that inasmuch as Congress has confirmed the "concession to the donee as ONE DERIVED FROM A FORMER "SOVEREIGN OF THE PROVINCE," (in the case at bar, the United States did so confirm, both by its courts and by letters-patent,) "ITS GENUINENESS AND AUTHORITY ARE ESTABLISHED." (Subsequently reaffirmed in "UNITED STATES-vs-CLA- MORGAN", 101 U. S. 831.)

In "HOADLEY-vs-SAN FRANCISCO", 124 U. S. 644: (A. D. 1887.) this Court says:—

"When the ordinance"—("No. 822" of common council, known as " Van Ness Ordinance",—"for the settlement and quieting of the land titles in the city of San Francisco.")— "was passed, the title of the city to the property covered by "the claim then pending before the District Court on appeal "was imperfect. It never did acquire title by entry as con- "templated in the first section, AND THAT FURTHER ACTION WAS "REQUIRED BOTH BY THE LEGISLATURE OF CALIFORNIA, AND BY "CONGRESS before occupants could secure title under the "grants contemplated in sec. 2 is clearly shown by sec. 10,

"which specially provides for application to the legislature "to confirm and ratify the ordinance, AND TO CONGRESS "TO RELINQUISH THE TITLE OF THE UNITED "STATES. THE ORDINANCE GRANTED ONLY SUCH TITLE AS THE "CITY WAS PERMITTED BY CONGRESS AND THE STATE "TO CONVEY. IN ITS LEGAL EFFECT THE ACT OF "CONGRESS CONVEYED THE LANDS TO THE CITY "FOR THE USES AND PURPOSES SPECIFIED IN THE "ORDINANCES AND THE ORDER OF THE CITY RATI- "FIED BY THE ACT OF THE LEGISLATURE."

* * * * * * * * *

NO SUCH "ACT OF CONGRESS," AS MENTIONED IN THE LAST CITED CASE, (seq.) WAS EVER PASSED IN THE CASE OF THE "PUEBLO LANDS OF THE CITY OF MONTEREY", authorizing their sale, in the first instance, or subsequently to said alleged sale, confirming the same or ratifying the act of the state legislature of California which was passed by it on the second of April, in the year 1866,—(Cal. Stat. 1865-6, 834.)—indirectly confirming said illegal sale to said Jacks, defendant in error.

If said Act of Congress was necessary in the one case, of the pueblo of San Francisco, why not in the case at bar? Therefore, "THE TITLE OF THE UNITED STATES" in and to said "PUEBLO LANDS OF THE CITY OF MONTEREY",—and as "THE TITLE OF THE ORIGINAL DONEE WAS COMPLETE WHEN THE PROVINCE (of California) WAS CEDED TO THE UNITED STATES * * * AND IS PROTECTED BY THE TREATY OF CONCESSION",—(Guadalupe-Hidalgo),—NEVER PASSED TO ANYONE,—INDIVIDUAL OR CORPORATE BEING,—UNTIL DONE SO BY ITS OWN SOVEREIGN ACT OF LETTERS-PATENT ISSUED TO SAID CITY OF MONTEREY ON SAID 19th DAY OF NOVEMBER, 1891.

* * * * * * * * *

Mr. JUSTICE FIELD, in speaking of the above mentioned Act of Congress, (seq.) in "GRISAR-vs-McDOWELL", 6 WALL. 378-9, uses the following language:—

"By this Act, the government has expressed its precise will "with respect to the claim of the City of San Francisco to "her lands, as it was then recognized by the Circuit Court of "the United States. In the execution of its treaty obligations "with respect to property claimed under MEXICAN LAWS, THE "GOVERNMENT may adopt such modes of procedure as it may "deem expedient. It may act by legislation directly upon "the claims preferred, or it may provide a special board for

"their determination, or it may require their submission to "the ordinary tribunals. IT IS THE SOLE JUDGE OF THE PRO- "PRIETY OF THE MODE, AND HAVING THE PLENARY POWER OF "CONFIRMATION, it may annex any conditions to the confirma- "tion of a claim resting upon an imperfect right, which it may "choose. It may declare the action of the special board "final; it may make it subject to appeal; it may require the "appeal to go through one or more courts, and it may arrest "the action of board or courts at any stage."

This noted case has a direct bearing upon the question of the necessity of FEDERAL LEGISLATION confimatory of state legislation, ratifying the sale of pueblo lands to private parties. It involved essentially the question of the nature of the title and ownership of lands held by Mexican Pueblos under the laws of Mexico in force in California, at the date of the conquest of that country and its acquisition by the U. S.

The Court further says:—

"By the laws of Mexico, which prevailed in California at "the date of the conquest, pueblos or towns, when once es- "tablished and officially recognized, were entitled, FOR "THEIR BENEFIT AND THE BENEFIT OF THEIR INHABITANTS, "to the use of lands, embracing the site of such "pueblos or towns, and of adjoining lands within cer- "tain prescribed limits. This right, as we observed "in Townsend-vs-Greeley (5 Wall. 336.) appears to have been "common to the cities and towns of Spain from an early "period in her history, and was recognized in the laws and "ordinances for the settlement and government of her "colonies on this continent. The same general system of laws "for the establishment and government of pueblos, and the as- "signment to them of lands that prevailed under Spain, WAS "CONTINUED IN MEXICO with but little variation, after her "separation from the mother country."

* * * * * * * *

"THE PURPOSES TO BE ACCOMPLISHED BY THE CREATION OF "PUEBLOS DID NOT REQUIRE THEIR POSSESSION OF THE FEE. The "interest as we had occasion to observe in the case already "cited, (5 Wall. 336), amounted to little more than a RE- "STRICTED AND QUALIFIED RIGHT TO ALIENATE PORTIONS OF THE "LAND TO ITS INHABITANTS FOR BUILDING OR CULTIVATION, FOR "PASTURE LANDS, OR A SOURCE OF REVENUE, OR FOR OTHER PUBLIC "PURPOSES. AND THIS LIMITED RIGHT OF DISPOSI-

"TION AND USE WAS IN ALL PARTICULARS SUBJECT "TO THE CONTROL OF THE GOVERNMENT OF THE "COUNTRY."—that is,—"THE UNITED MEXICAN "STATES".

TREATY OF GUADALUPE-HIDALGO: ACT OF MARCH 3, 1851.

In "TOWNSEND-vs-GREELEY", 5 WALL. 334, this Court says of said treaty,—"It did not divest the pueblos of "any rights of property nor alter the character of their in- "terests in pueblo lands." And of the Act of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California", this court says, in same case,—"The Act of Congress of March 3, 1851, did not change the nature of estates in land held by pueblos." (SAN FRANCISCO-vs-LEROY, 138 U. S. 656.)

In "PALMER-vs-LOW", 98 U. S. 16, this court used this language,—

"THE ESTATES OF THE PUEBLOS IN THEIR LANDS "AT THE TIME OF THE TREATY WERE NOT INDE- "FEASIBLE, BUT SIMPLY A LIMITED RIGHT OF DIS- "POSITION AND USE, SUBJECT IN ALL PARTICULARS "TO THE CONTROL OF THE GOVERNMENT OF THE "COUNTRY, AND BEFORE SUCH ESTATES COULD BE- "COME ABSOLUTE AND INDEFEASIBLE, SOME AC- "TION WAS REQUIRED ON THE PART OF THE UNITED "STATES."

MUNICIPAL TRUST PROPERTY, EXEMPT FROM SALE.

It seems hardly necessary to cite an authority on the subject of the exemption of municipal trust property from sale or execution for the debts of a municipality, but one and one only is given that is so apropos as to warrant its presentation, in part: it is the case of "MERRIWETHER-vs-GARRETT", 102, U. S. 472-533, (A. D. 1881,) in that portion of the opinion delivered by Mr. JUSTICE FIELD, for himself and JUSTICES MILLER AND BRADLEY. He says:—

"What, then, is the property of a municipal corporation, "which, upon its dissolution, a court of equity will lay hold "of and apply to the payment of its debts? We answer,

"first, that it is not property held by the corporation IN TRUST "for a private charity, for in such property the corporation "possesses no interest for its own use; and, secondly, THAT IT "IS NOT PROPERTY HELD IN TRUST FOR THE PUBLIC, FOR OF SUCH "PROPERTY THE CORPORATION IS THE MERE AGENT OF THE STATE." (?); "In its streets, wharves, cemeteries, hospitals, court-"houses, and other public buildings, the corporation has no "proprietary rights distinct from THE TRUST FOR THE PUBLIC. "IT HOLDS THEM FOR PUBLIC USE, AND TO NO OTHER USE CAN "THEY BE APPROPRIATED WITHOUT SPECIAL LEGISLATIVE "SANCTION." "It would be a perversion of that trust to "apply them to other uses. The courts can have nothing to "do with them, unless appealed to on behalf of the public TO "PREVENT THEIR DIVERSION FROM THE PUBLIC USE.

"The dissolution of the charter does not divest THE TRUST SO "as to subject property of this kind to a liability from which "it was previously exempt. Upon the dissolution, the pro-"perty passes under the immediate control of the State, the "agency of the corporation then ceasing."

AGAIN:—

"What is the property of a municipal corporation which, "on its dissolution, the courts can reach and apply to the pay-"ment of its debts? We answer, it is the private property "of the corporation, that is, such as is held in its own right "for profit or as a source of revenue,—NOT CHARGED "WITH ANY PUBLIC TRUST OR USE, and funds in its pos-"session unappropriated to any specific purpose. In this re-"spect the position of the extinct corporation is not dissimilar "to that of a deceased individual; IT IS ONLY SUCH PROPERTY "AS IS POSSESSED, FREED FROM ANY TRUST, GENERAL "OR SPECIAL, WHICH CAN GO IN LIQUIDATION OF "DEBTS."

It is respectfully asked this Court, if "the streets, wharves," etc., of a defunct municipal corporation, because "held in trust for the public", are exempt from the decrees of courts for liquidation of its debts, how much the more so are "pueblo lands", especially when they are held simply and solely in trust, as so decided by this court itself in other cases cited, the fee title at the time of sale, (1859), being in the United States of America as the legal and sovereign successor of those other sovereign Nations of Spain and Mexico? The Corporation

of The City of Monterey, plaintiff in error, "HOLDS THEM FOR PUBLIC USE, AND TO NO OTHER USE CAN THEY BE APPROPRIATED WITHOUT SPECIAL LEGISLATIVE SANCTION"—BY THE CONGRESS OF THE UNITED STATES OF AMERICA, AND BY IT CONJOINTLY WITH THE STATE LEGISLATURE. In fact, an Act embodying this principle, hereinbefore alluded to, was passed by Congress on March 8, 1866, in regard to the Pueblo Lands of the City of San Francisco, as follows:—

"BE IT ENACTED, etc.: THAT ALL THE RIGHT AND TITLE "OF THE UNITED STATES to the land situated within the cor- "porate limits of the City of San Francisco, in the State of "California, CONFIRMED to the city of San Francisco by the "decree of the Circuit Court of the United States for the "northern district of California, entered on the eighteenth "day of May, one thousand eight hundred and sixty-five, BE, "AND THE SAME ARE HEREBY, RELINQUISHED AND "GRANTED to the said city of San Francisco and its succes- "sors, and the CLAIM OF THE SAID CITY TO SAID LAND "IS HEREBY CONFIRMED, subject, however, to the reser- "vations and exceptions designated in said decree, and UPON "THE FOLLOWING TRUSTS, namely, that all the said land, "not heretofore granted to said city, SHALL BE DISPOSED OF AND "CONVEYED BY SAID CITY TO PARTIES IN THE BONA FIDE ACTUAL "POSSESSION THEREOF, by themselves or tenants, on the passage "of this act, in such quantities and upon such terms and con- "ditions as the legislature of the state of California may pre- "scribe, except such parcels thereof as may be reserved and "set apart by ordinance of said city for public uses:

"PROVIDED, HOWEVER, THAT THE RELINQUISHMENT AND GRANT "BY THIS ACT SHALL NOT INTERFERE WITH OR PREJUDICE ANY "VALID ADVERSE RIGHT OR CLAIM, IF SUCH EXIST, TO SAID LAND OR "ANY PART THEREOF, WHETHER DERIVED FROM SPAIN, MEXICO "OR THE UNITED STATES, OR PRECLUDE A JUDICIAL EX- "AMINATION AND ADJUSTMENT THEREOF. APPROVED, MARCH 8, "1866." (See, also, Act of July 1, 1864, Sec. 5.)

* * * * * * * *

No such Act of Congress of relinquishment and grant, as to the pueblo lands of the City of Monterey, was ever passed, and was not, therefore, presented by defendant in error at the trial below, confirming the said act of the state legislature of California which purported to ratify the said alleged sale of them to defendant in error and said D. R. Ashley, by said al-

leged city trustees; a copy of the greater part of which act of the state legislature appears in full, in Petition for the Writ of error herein on pages 85 and 86 of Record.

ACT OF CONGRESS, ADMITTING CALIFORNIA INTO THE UNION.

(U. S. Rev. Stat. IX, 1849-50, 452.)

"SECTION 3. * * * that the said State of California is "admitted into the Union upon the express condition that the "people of said State, THROUGH THEIR LEGISLATURE OR OTHERWISE, SHALL NEVER INTERFERE WITH THE PRIMARY DISPOSAL OF "THE PUBLIC LANDS WITHIN ITS LIMITS, AND SHALL PASS NO "LAW AND DO NO ACT WHEREBY THE TITLE OF THE "UNITED STATES TO, AND RIGHT TO DISPOSE OF, "THE SAME SHALL BE IMPAIRED OR QUESTIONED."* NOTE.

*NOTE. The U. S. Congress having failed to pass a bill establishing a territorial government in California, which was presented in 1849, and two bills establishing a State government there, which were presented in 1849 and in 1850, passed the act for the admission of California as one of the United States, which was approved September 9, 1850. A subsequent act of Congress, which was approved September 28, 1856, provided, "That all the laws of the United States which are not "locally inapplicable shall have the same force and effect "within the State of California as elsewhere within the United "States." (U. S. Constitutions, Colonial Charters: Vol. 1, p. 207.)

CONSTITUTION OF CALIFORNIA. (Ratified, May 7, 1879.)

"SECTION 3. The State of California is an inseparable part "of the American Union, AND THE CONSTITUTION OF THE "UNITED STATES IS THE SUPREME LAW OF THE LAND." (See, also, Constitution of 1849, Art. XII. Schedule Sec. 1. as follows:—)

"Article XII; Schedule. Sec. 1. ALL RIGHTS, prosecutions, "CLAIMS and contracts, as well of individuals as of BODIES "CORPORATE, and all laws in force at the time of the adoption "of this Constitution, and not inconsistent therewith, until "altered or repealed by the legislature, shall continue as if "the same had not been adopted."

(The Constitution of the United States is a part of the organic law of each State in the American Union: TAYLOR-vs-

TAINTOR, 16 WALL. 366: EX-PARTE ROMAINE, 23 CAL. 585.)

Article VI, of the U. S. CONSTITUTION provides that the Constitution and all laws enacted in pursuance thereof, and "all treaties made * * * under the United States",—"SHALL BE THE SUPREME LAW OF THE LAND; AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING."

Art. 1. Sec. 10, forbids any state passing "ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS."

* * * * * * * *

Here, then, was attempted a sale of the entire, unsurveyed and unpatented pueblo lands, by the trustees of a municipality by virtue of state legislative enactments alone; contrary to said act of admission of said state of California into the federal union, and its constitution of 1849 itself; to the decisions of this court and acts of Congress applicable thereto; and to Articles 1 and 6, of the U. S. Constitution; in conjunction with its attorney and defendant in error, jointly, to dispossess the City of Monterey of upwards of 30,000 acres of its pueblo lands held by it under an international contract, as a perpetual trust; for the avowed purpose of liquidating its indebtedness to said attorney of $750.00, and interest,—totaling $991.50—for his fees in securing to it the confirmation of the same by the U. S. Tribunals!

SHALL THIS COURT SANCTION SUCH BAREFACED INIQUITY, BY DECIDING AGAINST THE VALIDITY OF THE LETTERS-PATENT ISSUED TO SAID CITY, AS AFORESAID, AND UPON WHICH ITS TITLE "IN FEE" RESTS (18 Cal. 571), AND WHICH BY SAID FINAL DECREE HEREIN APPEALED FROM, IS DECLARED TO BE OF NO FORCE AND EFFECT, AS AGAINST THE TITLE SET UP BY SAID DAVID JACKS, WHO DID NOT DARE ASK FOR HIS SUBSTITUTION AS "CLAIMANT", AS HE DID IN THE CASE OF "RANCHO EL PESCADERO," NOR FOR A PATENT TO HIMSELF OF SAID PUEBLO LANDS; NOR FOR CONGRESSIONAL ACTION? (Cooley's Const. Lim. 333-4; 113, U. S. 574.)

COPY OF "CONSTITUTIVE ACTS OF THE MEXICAN FEDERATION."

"The Supreme Executive Power, provisionally appointed by the sovereign Mexican Congress, to all to whom these presents shall come, greeting: Know ye, that the sovereign Constituent Congress has decreed as follows:

The sovereign Constituent Mexican Congress has thought proper to enact the following CONSTITUTIVE ACT OF THE FEDERATION.

FORM OF GOVERNMENT AND RELIGION.

ART. 1. The Mexican nation is composed of the provinces formerly known as the vice-royalty of New Spain, the captain-generalship of Yucatan, and the internal provinces of the east and west.

ART. 2. The Mexican nation is forever free and independent of Spain, and of every other power, and it is not, nor can it ever become the patrimony of any family or person.

ART. 3. The sovereign power resides wholly and exclusively in the nation, which has consequently the exclusive power to adopt and to establish by means of its representatives, the form of government and other fundamental laws, which may appear to it best suited to its preservation and prosperity, and to change and to modify such laws, whenever it may think proper.

ART. 4. The religion of the Mexican nation is and shall perpetually remain the Roman Catholic and Apostolic. The nation protects it by just and wise laws, and prohibits the exercise of every other.

ART. 5. The nation adopts for the form of its government, a popular representative and federal republic.

ART. 6. Its integral parts are free, sovereign and independent states, in as far as regards exclusively its internal administration, according to the rules laid down in this Act, and in the general Constitution.

ART. 7. THE STATES, at present comprising the federation, are the following, viz: Guanjuato; the internal state of the west composed of the provinces of Sonora and Sinaloa; the internal state of the east comprising the provinces of New Leon, Coahuila and Texas; the in-

ternal state of the north containing the provinces of Chihuahua, Durango and New Mexico; Mexico; Michoacan; Oajaca; Puebla de los Angeles; Queretaro; San Luis Potosi; New Santander, called also Tamaulipas; Tobasco; Tlascala; Vera Cruz; Jalisco; Yucatan and Zacatecas.

THE CALIFORNIAS and the district of Colima, (except the town of Tonila, which remains annexed to Jalisco) WILL FOR THE PRESENT BE TERRITORIES OF THE FEDERATION AND DIRECTLY SUBJECT TO ITS SUPREME POWER.

ART. 8. The Constitution may increase the number of states mentioned in the preceding article, and modify them as it may deem most conducive to the happiness of the people.

Given in Mexico the 31st of January, 1824.

Jose Mariano Michilena, President; Miguel Domingo. Vincente Guerrero."

(White's New Recopilacion: Vol. 1, p. 374.)

* * * * * * * *

COPY OF PART OF

"THE FEDERAL CONSTITUTION OF THE UNITED MEXICAN STATES, SANCTIONED BY THE GENERAL CONSTITUENT CONGRESS OF THE 4th OCTOBER, 1824."

"CONSTITUTION OF THE UNITED MEXICAN STATES."

(Title 1. Only Section.)

"ART. 1. The Mexican nation is forever free and independent of Spanish government and every other power.

"ART. 2. Its territory comprehends the former vice-royalty of New Spain, the captain-generalship of Yucatan, the former commandancy of the internal PROVINCES of the east and west and UPPER AND LOWER CALIFORNIA with the lands annexed and the adjacent islands in both oceans. A constitutional law will be made for designating the boundaries of the Federation as soon as circumstances will permit.

"ART. 3. The religion of the Mexican nation shall perpetually remain the Roman Catholic and Apostolic. The nation protects it by wise and just laws and prohibits the exercise of every other.

(Title 2. Only Section.)

(Of the form of government of the nation; of its integral (parts of the division of the Supreme Power.)

"ART. 4. The Mexican nation adopts for the form of its government a popular representative and federal republic.

"ART. 5. The constituent parts of the Federation are the following STATES AND TERRITORIES, viz: THE STATES of Chiapas, Chihuahua, Coahuila, and Texas, Durango, Guanajuato, Mexico, Michoacan, Nuevo Leon, Oajaca, Pueblo de los Angeles, Queretaro, San Luis Potosi, Sonora and Sinaloa, Tobasco, Tamaulipas, Vera Cruz, Jalisco, Yucatan, and Zacatecas.

☞ THE TERRITORIES OF UPPER CAIFORNIA, LOWER CALIFORNIA, Colima, and Santa Fe de Nuevo Mexico. A constitutional law will fix the character of Tlascala.

ART. 6. The Supreme Power of the Federation as to its exercise, is divided into legislative, executive and judicial powers.

* * * * * * * *

"ART. 50. Sec. 30. TO GRANT LAWS AND DECREES FOR THE INTERIOR ADMINISTRATION OF THE TERRITORIES.

* * * * * * * *

Given in Mexico on the 4th of October, in the year of our lord, 1824, in the 4th year of Independence, 3rd of Liberty and 2nd of the Confederation.

Signed: LORENZO de ZAVALA, President, etc." (Idem. p. 387, 393-5.)

COLONIZATION LAWS OF THE UNITED MEXICAN STATES.

"DECREE OF AUGUST 18, 1824": (Reynolds: Span. & Mex. Laws, p. 121.)

ART. 1. The object of this law is those lands of THE NATION, which, not being private property NOR BELONGING TO ANY CORPORATION OR TOWN, can be colonized. * * * * * *

ART. 16. The government, under the principles of this law, shall proceed to the colonization of THE TERRITORIES OF THE REPUBLIC."

* * * * * * * *

REGULATIONS FOR THE COLONIZATION OF THE TERRITORIES OF THE REPUBLIC: (NOVEMBER 21, 1824.)

"1. THE POLITICAL CHIEFS OF THE TERRITORIES are authorized under the law of the GENERAL CONGRESS of the 18th of August, 1824, and under the conditions that will hereafter be stated, to grant the public lands of their respective Territories to the contractors, families or private persons, Mexicans or foreigners, who may apply for them, for the purpose of cultivating them or living upon them.

2. Every applicant for land, whether contractor, head of family or private person, shall apply to THE POLITICAL CHIEF of the respective Territory, with an application in which is given his name, country, profession, the number, nature, religion and other circumstances of the families or persons whom he desires to colonize, and shall also mark as distinctly as possible and describe on a map the land he applies for.

3. THE POLITICAL CHIEF shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th August, are found in the application, both as regards the land and the applicant, either that this latter be attended to simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant.

4. In view of all of which THE POLITICAL CHIEF shall grant or not said application, in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited.

5. The grants made to private persons or families shall not be held to be definitely valid WITHOUT THE PREVIOUS CONSENT OF THE TERRITORIAL DEPUTATION, for which purpose the respective proceedings shall be forwarded to it.

6. WHEN THE POLITICAL CHIEF SHALL NOT OBTAIN THE APPROVAL OF THE TERRITORIAL DEPUTATION, HE SHALL REPORT TO THE SUPREME GOVERNMENT, FORWARDING THE PROCEEDINGS IN THE MATTER FOR ITS CONSIDERATION.

7. Grants made to contractors for the colonization of many families shall not be held to be definitely valid until the approval of THE SUPREME GOVERNMENT is obtained, to which a

report shall be made and the proceedings forwarded, together with the statement that may appear proper to THE TERRITORIAL DEPUTATION.

8. The grant asked for being definitely made, a document signed by THE POLITICAL CHIEF shall be issued to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the laws, in virtue of which the possession shall be given.

9. The corresponding entries of all the applications presented and grants made shall be made in a book intended for the purpose, with the maps of the lands that shall be granted and a detailed report shall be forwarded to the SUPREME GOVERNMENT every quarter.

10. No stipulation shall be admitted for a new settlement, unless the contractor obligates himself to furnish at least twelve families as settlers.

11. THE POLITICAL CHIEF shall set a reasonable time for the settler, within which he must necessarily cultivate or occupy the land in the terms and with the number of families he has stipulated, in the intelligence that if he does not do so, the grant of the land shall be void but THE POLITICAL CHIEF may, nevertheless, re-validate it in proportion to the part in which the party in interest has complied.

12. Every new settler, after he has cultivated or occupied the land under his stipulation, shall be careful to so show to the MUNICIPAL AUTHORITY, in order to consolidate and secure his right to the property to enable him to freely dispose thereof, after the proper record has been made.

13. The aggregation of many families in a settlement, in its formation, internal government and police, shall follow the rules established in existing laws for the other settlements of the Republic, special care being taken in new settlements that they be constructed with the regularity possible.

14. The minimum of irrigable land that may be given for colonization by a single person shall be two hundred VARAS in a square; the minimum of TEMPORAL land eight hundred VARAS; the minimum of grazing land shall be one thousand two hundred VARAS.

15. The land that may be given for a building-lot shall be one hundred VARAS.

16. The vacant tracts that may exist between colonized lands may be distributed between adjoining holders, who

have cultivated their own lands with application and have not received the full extent of land the law allows, or the children of said holders who apply for them to consolidate the properties of their families, bearing in mind therefor the morality and industriousness of the parties in interest.

17. In the territories where there are missions the lands occupied by them cannot be colonized at present, and until it is decided whether they should be considered as the property of the Settlements of the Neophytes, Catechumens and Mexican settlers."

(Code of Colonization, Mexico, 1893, p. 237, No. 71; Reynolds, p. 141.)

* * * * * * * * *

RECORD DATA, AS TO "PUEBLO LANDS OF THE CITY OF MONTEREY."

"A Mexican Pueblo", with "special concession from Spanish Crown": (Record, p. 63.)

Boundaries fixed by "Territorial Deputation", July 24, 1830: Record, p. 22.

Treaty and Protocol, Guadalupe-Hidalgo, Feb. and May, 1848: Treat. Mex. pp. 681-93.

Act admitting California into Federal Union, Sep. 9, 1850: U. S. Stat. 9. p. 452.

Act to Settle Land Claims in California, March 3, 1851: U. S. Stat. 9. p. 631.

Petition for Confirmation, to U. S. Commission, March 2, 1853: Record, p. 23.

Order of Confirmation by U. S. Commission, January 22, 1856: Record, p. 25.

D. R. Ashley's professional claim, $750.00, for services. Record, p. 46.

Notice of "sale" by City Trustees (2 weeks), January 25, 1859: Record, p. 47.

Deed to Jacks and Ashley, ($991.50) February 9, 1859: Record, pp. 40-42.

Repudiation of "Sale", by Board of Trustees, June 23, 1865: Record, p. 53.

Alleged "sale", Ashley to Jacks, ½ interest, Sept. 14, 1868: Record, p. 51.

U. S. Survey approved by U. S. Surveyor-General, January 5, 1869: Record, p. 33.

Jacks first began to pay taxes on same, 1877: Record, p. 50.

U. S. Patent issued to City of Monterey, November 19, 1891: Record, pp. 30-34.

Suit to quiet title by City against Jacks, December 19, 1891: Record, pp. 1-4.

Suit to quiet title by City, against Jacks, November 17, 1896: Record, pp. 4-20.

"Final Judgment", consolidated suit; Sup. Ct. Calif., July 11, 1903: Record, pp. 61-74.

Petition for Writ of Error, granted, U. S. Sup. Ct., March 10, 1905: Record, pp. 74-95.

CENTRAL SYSTEM, (1835-1847): ACT OF REFORMS.

The era in Mexican history, extending from 1835 to 1847, is known as the time of the Central Government.

On August 22, 1846, the Constitution of 1824 was provisionally re-established in pursuance of the plan of the "Citadel" of August 4, 1846; and on May 18, 1847, the ACT OF CONSTITUTIONAL REFORMS was enacted, which placed the Mexican Republic fully under the CONSTITUTION AND THE CONSTITUTIVE ACT OF 1824, as modified by said Act of Reforms.

In the preamble of this Act of Reforms, (May 18, 1847), we find,—

"That the Constitutive Act and the Federal Constitution, "sanctioned on the 31st of January and the 4th of October, "1824, FORM THE ONLY POLITICAL CONSTITUTION OF THE REPUB-"LIC."

(Reynold's Spanish and Mexican Law, p. 281.)

(Bancroft's History. Vol. V., pp. 151-260.)

* * * * * * * *

Thus it will be seen, the "Territory of California" remained simply as such territory of the Mexican Republic continuously up to the time of the treaty of Guadalupe-Hidalgo, and as a local government partook of none of the rights over pueblo lands within their limits, that were guaranteed the several Mexican States under and by virtue of said Act of May 18, 1847: "the paramount title", therefore, still vested in the sovereign Mexican Nation, as such, in and to said pueblo lands of the City of Monterey, AS PART OF SAID NATION'S DOMAIN, SUBJECT, HOWEVER, TO THE PERPETUAL TRUST AS CONTAINED IN SUCH GRANTS.

HOW DID THE "STATE" OF CALIFORNIA GET TITLE OR JURISDICTION?

So we conclude as we began, with the query, how did the "Succeeding Sovereign State" of California secure its title in and to, and supreme jurisdiction over, said unsurveyed, unpatented Pueblo Lands of the City of Monterey? It did not have them when a Province or Territory of the Spanish or Mexican Governments; they were not received under or by virtue of any Act of the United States Congress, by legislative grant or otherwise. (Meader-vs-Norton; supra.)

On the contrary, said State was specifically debarred from making any claim thereto, by the very Act of Congress admitting it into the Federal Union as such state, as well as by its own constitution, (supra.); by the several Acts of the U. S. Congress and Supreme Court Decisions above cited; as also by the following decision of its own highest court itself, rendered in the year 1850,—before the gospel of land-grabbing had begun to infest the land, and not many years after the doctrine of state "nullification" of Federal Law had been scotched into innocuous desuetude,—to be galvanized into renewed activity by the same Court in the year of grace, 1903!

The decision referred to, is found in the case of WOODWORTH-VS-FULTON, 1 Calif., p. 307-8, (A. D. 1850): The Court, by Bennet J. says, in part.—

"I am, however, of the opinion that, even though San Fran-"cisco had become a pueblo previous to the conquest, and had "been invested with all the rights incident to such character, "the lands within its limits STILL CONTINUED A PORTION OF THE "PUBLIC DOMAIN. THE FULL AND ABSOLUTE TITLE OF THE "NATION TO LANDS WITHIN THE LIMITS OF PUEB-"LOS, OTHER THAN SUCH AS WERE, IN LIMITED QUANTITIES, EX-"PRESSLY GRANTED TO THE PUEBLO FOR THE PURPOSE OF DEFRAY-"ING CERTAIN EXPENSES INCIDENTAL TO THE ADMINISTRATION OF "THE LOCAL GOVERNMENT, DOES NOT SEEM, IN ANY CASE, "SO FAR AS I HAVE BEEN ABLE TO ASCERTAIN, TO "HAVE BEEN DIVESTED OR IN THE LEAST IM-"PAIRED.

"IT IS TRUE THAT TO CERTAIN OFFICERS WAS COMMITTED THE "AUTHORITY OF PARCELLING OUT PUEBLO LANDS, SUBJECT TO "SPECIFIC RULES AND RESTRICTIONS IMPOSED BY LAW: BUT SUCH

"OFFICERS APPEAR TO HAVE ACTED RATHER AS ALMONERS OF "THE SUPREME GOVERNMENT IN DISPENSING ITS "BOUNTY, THAN AS AGENTS OF THE PUEBLOS IN DISPOSING OF "PROPERTY, THE TITLE OF WHICH THEY HELD AS MUNICIPAL "BODIES.

"THE UNITED STATES, BY THE CONQUEST OF CALI-"FORNIA, ACQUIRED AN INCHOATE AND IMPERFECT "TITLE TO ALL THE NATIONAL DOMAIN OF MEXICO "SITUATED IN THAT TERRITORY, WHICH TITLE WAS "PERFECTED BY THE TREATY OF PEACE. (Wheaton's "International Law, pp. 208, 396, 440, Ed. 1846: Vattel, p. 386.)

"THE TITLE OF THE UNITED STATES RELATES BACK TO THE TIME "OF THE OCCUPATION OF THE COUNTRY; AND CONSEQUENTLY, ALL "LAWS OF MEXICO CONCERNING THE DISPOSITION OF PUBLIC LANDS "MUST HAVE CEASED THE MOMENT CALIFORNIA WAS EFFECTUALLY "SUBDUED AND OCCUPIED BY THE AMERICAN FORCES; AND NEITHER "MEXICAN NOR AMERICAN OFFICERS HAD ANY POWER, UNDER THE "PREVIOUSLY EXISTING LAWS, OR UNDER ANY LAWS OF THE UNITED "STATES, TO GRANT, SELL, OR IN ANY WAY DISPOSE OF ANY PORTION "OF THE NATIONAL DOMAIN, WHICH HAD THUS "BEEN TRANSFERRED FROM THE SOVEREIGNTY OF "MEXICO TO THE SOVEREIGNTY OF THE UNITED "STATES."

PATENT FOR MEXICAN LAND GRANT, A DEED FROM THE UNITED STATES.

In "Teschemacher-vs-Thompson", 18 Cal., p. 26-28, (A. D. 1861) the same court says,—

"The State AND ALL OTHER PARTIES must hold IN SUBORDINA-TION to the action of THE GOVERNMENT respecting it."—i. e. THE U. S. PATENT.

In "Lease-vs-Clark", 18 Cal., p. 571, (A. D. 1861.) said court says,—

"It is the last act of a series of proceedings taken for the "recognition and confirmation of the CLAIM of the patentees "to the land it embraces, the first of which was the petition "to the Board of Land Commissioners.

"With respect to such proceedings it takes effect by rela-"tion at the date of the first act. AS THE DEED OF THE UNITED "STATES, it is to be regarded as if it had been executed at that

"time. It passes WHATEVER INTEREST THE UNITED STATES MAY "THEN HAVE POSSESSED IN THE PREMISES. It operates in conse- "quence AS AN ABSOLUTE BAR TO ALL CLAIMS "UNDER THE UNITED STATES, HAVING THEIR "ORIGIN SUBSEQUENT TO THE PETITION."

"In "Bernal-vs-Lynch", 36 Cal., p. 140-2, (A. D. 1868) the BRIEF OF GARBER, states, in part;—

"At the date of the cession of California by MEXICO, THE "UNITED STATES took the CEDED TERRITORY subject to grants of "portions thereof, already made by MEXICO." * * * "The "location of these grants was a duty devolving on THE SOVE- "REIGN, and could not be performed by the grantee. THIS DUTY "WAS IMPOSED ON THE UNITED STATES AS THE SUCCESSOR OF "MEXICO," etc. * * * *

"In Baker-vs-Brickell", 87 Cal., p. 333-4, (A. D. 1891) said court says,—

"At the time of the passage of this Act (March 8, 1866), the "LEGAL TITLE OF THIS LAND (pueblo of S. F.) WAS IN THE UNITED "STATES." (p. 333). * * * *

"THE LEGAL TITLE TO THIS LAND PASSED TO THE UNITED STATES, "FROM MEXICO ON ITS ACQUISITION OF CALIFORNIA, and passed "to the city by the Act of March 8, 1866 (U. S.) upon the "trusts above set forth, for the BENEFIT OF SUCH OF ITS INHABI- "TANTS AS WERE IN BONA FIDE ACTUAL POSSESSION OF THE SAME "AT THE DATE OF THE PASSAGE OF THE ACT WHICH IS ABOVE RE- "FERRED TO, viz., on the 8th day of March, 1866." (See, also, Beard-vs-Federy, 3 Wall. 491.)

PER CONTRA.

IN THE CITY OF MONTEREY-VS-DAVID JACKS, 139 Cal. p. 553, appears the following portion of the "final judgment" appealed from, herein:—

"We are satisfied from the above authorities that while "under the Mexican law the officers of a pueblo were em- "powered to make grants of the pueblo lands, yet the pueblos "had no indefeasible proprietary interest in them: THAT THEY "WERE HELD IN TRUST FOR PUBLIC AND MUNICIPAL PURPOSES, SUB- "JECT TO THE CONTROL AND DISPOSITION OF THE MEXICAN GOV- "ERNMENTS; THAT UPON THE ESTABLISHMENT OF OUR STATE GOV- "ERNMENT IT SUCCEEDED TO THE SAME SOVEREIGNTY OVER THEM "AS WAS EXERCISED BY THE FORMER GOVERNMENT, AND THAT

"THEIR CONTROL AND DISPOSITION CAME FULLY, EN-"TIRELY, AND ABSOLUTELY WITHIN THE POWER OF "THE LEGISLATURE AS REPRESENTING SUCH "SOVEREIGNTY.

"AND AS THE FULL AND COMPLETE CONTROL OF SAID LANDS WAS "A MATTER WITHIN THE POWER OF THE LEGISLATURE, IT COULD "HAVE ORIGINALLY CONFERRED UPON THE TRUSTEES OF THE CITY "OF MONTEREY (IF UNDER THE ACT IT DID NOT) THE RIGHT TO "DISPOSE OF THEM. WE THINK ALSO THAT THERE IS NO DOUBT "THAT THE LEGISLATURE HAD THE POWER TO CONFIRM THE DEED "IN QUESTION, AND THAT THE ACT IN QUESTION HERE OPERATED "TO EFFECT THAT PURPOSE." (Record pp. 65-9)

Continuing, Mr. Justice Lorigan, speaking for a majority of the court, says, —

"Pueblos under the Mexican law were simply part of the "political government of the country, and as political agencies "the STATE succeeded to control over them upon the change "of government. Whatever property they had incidental to "their existence as pueblos, was held as a MUNICIPAL TRUST "FOR THE PUBLIC USE OF THE PUEBLO. AS SUCH AGENCIES, THE "STATE WAS UNDER NO OBLIGATION TO CONTINUE THEIR EXIST-"ENCE. In the exercise of her sovereign power she could "have abolished them altogether, or have incorporated them "into her own scheme of government as municipalities, with "such powers and restrictions as she might see fit to impose "upon them. When incorporated by the legislature as muni-"cipalities under our government, the new municipalities did "not by the simple fact of incorporation succeed to the rights "and claims of their pueblo predecessors to the pueblo lands.

"THE FORMER PUEBLO TRUST, AND THE OWNER-"SHIP OF LANDS INCIDENT TO IT, HAD PASSED WITH "THE CHANGE OF FLAGS, AND VESTED IN THE "STATE OF CALIFORNIA AS SUCCEEDING SOVE-"REIGN." (Record p. 70)

* * * * * * * * *

It will thus be seen, that the gist of the Federal Question involved in the case at bar, is—IN WHICH SOVEREIGNTY, —STATE OR NATION,—DID THE PARAMOUNT TITLE TO SAID UNSURVEYED AND UNPATENTED PUEBLO LANDS OF THE CITY OF MONTEREY, AND JURISDIC-TION OVER THEM, VEST, ON THE CONSUMMATION OF THE TREATY OF GUADALUPE-HIDALGO UP TO

NOVEMBER, 19, 1891?—WHICH ONLY THIS COURT CAN DECIDE AS A FINALITY.

CONCLUSION.

In "DARTMOUTH COLLEGE-vs-WOODWARD," 4 Wheat, p. 518 seq. (A. D. 1820.) DANIEL WEBSTER, in his argument, speaking of the inviolability of the Royal Charter of Dartmouth College, uses this language (p. 560.) :—

"It cannot be pretended that the legislature" (of New Hampshire) "as successor to the King in this part of his pre-"rogative, has any power to revoke, vacate, or alter this "charter. If, therefore, the legislature has not this power by "any specific grant contained in the constitution; nor as in-"cluded in its ordinary legislative powers; nor by reason of "its succession to the prerogatives of the crown in this par-"ticular: on what ground would the authority to pass these "acts rest, even if there were no special prohibitory clauses "in the Constitution and the bill of rights?"

IF THIS BE TRUE AS TO A ROYAL CHARTER TO A PRIVATE ELEEMOSYNARY CORPORATION, WHY NOT OF A ROYAL GRANT OF LAND, IN TRUST, TO A PUEBLO?

IN BOTH CASES, THERE WAS AN "IMPAIRING THE OBLIGATION OF CONTRACTS."

New Hampshire's "succession to the prerogatives of the crown", came not thru its stateship in the Federal Union, but rather, if at all, as having been previously an original Royal Province of the Crown. The "province" or "territory" of California, under Spanish and Mexican regimes, was not even a "Territory" of the United States of America, before becoming a "State" in the Union, (Supra); it was simply a ceded, and conquered section of Mexican national domain at the time of conquest and accession, whose limits were fixed by the treaty of 1848, and remained under military rule up to the date of its admission into the Federal Union as a State: the official MAP used by the U. S. Treaty Commissioners, certified, and now on file in the Department of State, shows it to have been at that time simply a "TERRITORY" of Mexico. (See, also, Protocol, seq.)

In "NEW ORLEANS-vs-THE UNITED STATES", 10 PET. p. 674, (A. D. 1836.) Mr. WEBSTER, in his opening argument, says:—

"The ownership of property may be public, and the use "private. The decision of this court in the case of the Dart-"mouth College, established this." * * * "IT APPEARS "THAT THE DEDICATION OF LAND TO PUBLIC USES "IS AN ESTOPPEL OF ALL SUBSEQUENT CLAIM TO IT, "AS WELL BY THE CIVIL LAW AS BY THE COMMON "LAW OF ENGLAND. (FRENCH PANDECTS, ART. 15, 28; 3 "MARTIN'S REP. 296, 303, 304; 11 MARTIN'S REP. 660.)"

"BY THE ACT OF CONGRESS INCORPORATING THE CITY OF "NEW ORLEANS, ALL THE USE OF THE PROPERTY BECAME VESTED "IN THE CITY."

In the opinion of MR. JUSTICE McLEAN, in the same case (p. 731), after quoting quite fully the fundamental laws of the Spanish Nation applicable to the rights of cities, AS TO COMMONS, and much of which appears hereinbefore, is the following language:—

"THE LAND, HAVING BEEN DEDICATED TO PUBLIC "USE, WAS WITHDRAWN FROM COMMERCE; AND SO "LONG AS IT CONTINUED TO BE THUS USED, COULD "NOT BECOME THE PROPERTY OF ANY INDIVIDUAL. "SO CAREFUL WAS THE KING OF SPAIN TO GUARD "AGAINST THE ALIENATION OF PROPERTY WHICH "HAD BEEN DEDICATED TO PUBLIC USE, THAT IN A "LAW CITED, ALL SUCH CONVEYANCES ARE DE-"CLARED TO BE VOID." * * * * * (ante. p. 32.)(43)

"AS IT IS NOT NECESSARY, WE DO NOT DECIDE ON "THE RIGHT OF THE CORPORATION TO SELL ANY "PART OF THE COMMON, OR TO APPROPRIATE IT IN "ANY OTHER MANNER THAN AS ORIGINALLY DE-"SIGNATED."

(Vide, Hall, Mex. Law, p. 55: Townsend-vs-Greeley, Palmer-vs-Low, United States-vs-Perot, Fremont-vs-United States: Supra.)

Says the Petition for the Writ of Error, herein,—

"THAT, thus was "sold" to said D. R. ASHLEY and said "DAVID JACKS, aforesaid, UNDER AND BY VIRTUE OF A STATE "STATUTE, 29,698,53-100 ACRES OF UNSURVEYED AND UNPATENTED "PUEBLO LANDS",—"THE FEE" OF WHICH WAS AT THE VERY TIME

"VESTED IN THE SOVEREIGN GOVERNMENT OF THE UNITED STATES "OF AMERICA, GAINED BY CONQUEST AND PURCHASE AS THE VIC- "TORIOUS NATION, AND CEDED TO IT AS SUCH NATION BY SAID "TREATY OF GUADALUPE-HIDALGO; "SOLD" FOR A QUESTIONABLE AT- "TORNEY'S FEE FOR PROFESSIONAL SERVICES RENDERED!—THE "WHOLE OF THE PRINCELY ESTATE WHICH HE WAS ENGAGED TO "SECURE FOR HIS CLIENT AS ITS ATTORNEY;—THE PRICE PAID BY "THIS PRECIOUS BRACE OF LAND-PIRATES, FOR THE SAME, BEING "VALUED AT——NOT QUITE A LETTER-POSTAGE STAMP "PER ACRE! !—LANDS THAT TODAY ARE WORTH IN THE OPEN "MARKET, THE SUM OF BETWEEN THREE AND FIVE MILLIONS OF "DOLLARS!"

HAMILTON GAY HOWARD,
COUNSEL FOR PLAINTIFF IN ERROR.

APPENDIX.

"CONSTITUTION OF 1824 OF THE MEXICAN REPUBLIC."

"ARTICLE 171. Those articles of this Constitution and of the "Constitutive Act which establish the liberty and independ-"ence of the Mexican Nation, its religion, form of govern-"ment, liberty of the press and the division of the Supreme "powers of the union and of the States CAN NEVER BE "CHANGED."

("Constitution of Mexico, 1824-1847": White's Recopilacion of the Laws of Spain and the Indies and of Mexico and Texas.)

PROTOCOL OF THE TREATY OF GUADALUPE-HIDALGO: 2ND ARTICLE.

"2nd. The American Government by suppressing the Xth "article of the treaty of Guadalupe did not in any way intend "to annul the grants of lands made by Mexico in the ceded "territories. These grants, notwithstanding the suppression "of the article of the treaty, preserve the legal value which "they may possess, and the grantees may cause their legiti-"mate titles to be acknowledged before the American tri-"bunals.

"Comformably to the law of the United States, legitimate "titles to every description of property, personal and real, ex-"isting in the ceded territories are those which are legitimate "titles UNDER THE MEXICAN LAW IN CALIFORNIA AND NEW "MEXICO UP TO THE 13th OF MAY, 1846, AND IN TEXAS UP TO THE "2d MARCH, 1836." * * * * *

"In testimony of which, their Excellencies, the aforesaid "Commissioners and the Minister have signed and sealed, in "quintuplicate, the present protocol.

"(SEAL.) A. H. SEVIER.
"(SEAL.) NATHAN CLIFFORD.
"(SEAL.) LUIS DE LA ROSA."

(Vide, "Treaties and Conventions: Mexico, 1848": p. 693.)

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JAMES H. McKENNEY,
Clerk

In the

Supreme Court of the United States

October Term, 1905

THE CITY OF MONTEREY,
Plaintiff-in-Error.
versus
DAVID JACKS,
Defendant-in-Error.
Number 217

Addenda to Brief of Plaintiff-in-Error:

POINTS.

(1)

That, by virtue of section 2, of the PROTOCOL (Appendix, Brief, p. 65) and sections VIII and IX of the TREATY OF GUADALUPE-HIDALGO, in 1848, THE CORPORATION therefore known under Spanish and Mexican laws, as "THE PUEBLO OF MONTEREY", in the Province or Territory of California, Mexico, with all its PROPERTY RIGHTS as created and granted in and to the USE of its PUEBLO LANDS under said "foreign laws",—and subsequently, in general terms, guaranteed therein by article XII of the Constitution of 1849, of the State of California, (Brief, p. 49); by Act of Congress admitting said State into the federal union, of date, September 9, 1850 (idem); by Act of Congress, of date, March 3, 1851, entitled, "An Act to ascertain and settle the Private Land Claims in the State of

California;" specifically, by Decree of Confirmation by Board of U. S. Commissioners, of date, January 22, 1356 (Record, p. 25); and lastly by U. S. Letters Patent, of date, November 19, 1891, (R. pp. 30-34);—or as the "CITY OF MONTEREY", incorporated as such by the SPANISH CORTEZ, in 1813, (Record, p. 23), and re-incorporated by the State of California in 1856, (Record, p. 63);SAID PUEBLO OR CITY CAME UNDER UNITED STATES FEDERAL JURISDICTION, AT THE DATE OF SAID TREATY, RETAINING PRECISELY THE SAME GUARANTEED PROPERTY RIGHTS IN SAID PUEBLO LANDS AS WHEN ORIGINALLY SECURED BY IT UNDER SPANISH ROYAL GRANT AND "LAWS OF THE INDIES," (Brief, p. 32), UNREPEALED BY THE SUCCEEDING SOVEREIGN REGIME OF MEXICO, FROM 1824 TO 1848, (Brief, p. 39; Dartmouth College-vs-Woodward, 4, Wheat. 629, seq.); that, its RE-INCORPORATION by said Act of the Legislature of said State, as also, the succeeding Act of April 2, 1866, ratifying the "sale" of said lands, (Record, p. 85-6), DID NOT, AND COULD NOT, IN THE FACE OF THE RULING OF THIS COURT IN SAID CITED DARTMOUTH COLLEGE CASE, "REVOKE, VACATE OR ALTER" SAID CONTRACTUAL PROPERTY RIGHTS IN SAID PUEBLO LANDS HELD UNDER SAID GRANT, OR "FOREIGN LAWS" OF SPAIN AND MEXICO; that, this Court will take "JUDICIAL NOTICE" of said "foreign laws", under and by virtue of which said vested property rights were held,—"FOR AS TO THAT PORTION OF OUR TERRITORY, THEY ARE DOMESTIC LAWS", (United States-vs-Perot, 98 U. S. 428; Brief, p. 43.)

(2)

That, under those "foreign laws," known as "THE LAWS OF THE INDIES",(Brief, pp. 16-42), in force and operative in Mexico up to the date of said Treaty, (Brief, p. 39), PUEBLO LANDS NOT AT THE TIME "DISTRIBUTED TO ACTUAL SETTLERS", WERE HELD IN TRUST BY THE PUEBLOS

FOR THE USE ONLY OF THE INHABITANTS THEREOF, (Brief, p. 45-6); that, the contractual relationship of such trust between said pueblo or city, in said pueblo lands, and the supreme sovereign authority, could be revoked on account of violation of trust conditions by the former, and forfeited, and said lands would, thereupon, revert to the supreme sovereign authority, and become part of the royal or "public domain" again, BUT SAID LANDS COULD NOT BE SOLD BY SAID CITY TO ANYONE, IN AN ENTIRETY, UNDER ANY CIRCUMSTANCES. (Laws of Indies; Brief, pp. 31-33); that, therefore, the re-incorporated City of Monterey could not if it would, and then only under possible penalty of forfeiture of the entire beneficiary interest of its inhabitants to the sovereign successor of Mexico, to-wit, THE UNITED STATES OF AMERICA, dispose of any portion of said landed property contrary to said laws, so held in trust; that, the question of revocation and forfeiture on account of violation of said trust, is not now before this Court.

(3)

That, in view of the foregoing statements of law and fact, the "DEED" by which the Trustees of said City of Monterey QUIT CLAIMED (Feb. 9, 1859) "IN FEE SIMPLE ABSOLUTE" all of said pueblo lands therein described, as appears on pages 41-42 of said Record, to said Jacks and Ashley, SHOULD BE DECREED BY THIS COURT AS INVALID AND OF NO EFFECT; AN ACCOUNTING BE MADE, AND THE SAID "FINAL JUDGMENT" (Record, pp. 61-74.) HEREIN APPEALED FROM, AFFIRMING THE ADVERSE DECREE OF THE LOWER STATE COURT, BY SAID SUPREME COURT OF CALIFORNIA, SHOULD BE REVERSED AND SO CERTIFIED TO SAID SUPREME COURT, AND SAID PUEBLO LANDS DECLARED BY THIS COURT TO BE HELD IN PERPETUAL TRUST BY SAID CITY OF MONTEREY, AND ITS SUCCESSORS, SUBJECT TO SAID "LAWS OF THE INDIES" APPLICABLE THERETO.

(4)

That, the PATENT, issued (November 19, 1891; Record, p. 30-34) by the United States to the City of Monterey is, in legal effect, A SECOND SOVEREIGN GOVERNMENTAL AND "FINAL CONFIRMATION",—BY DEED, RELINQUISHING THE PARAMOUNT "RIGHT AND TITLE" ACQUIRED BY TREATY,—OF THE TRUST FOR THE PERPETUAL USE OF SAID LANDS BY THE CITIZENS OF SAID CITY,—in accordance with the terms of the trust-contract, actual or implied, as provided in said "Laws of the Indies,"—to wit,—as "COMMONS", "PASTURE LANDS" AND "MUNICIPAL DOMAINS",—("exhidos", "dehesas" and "propios")'—they being the only lands not "distributed",—to be used as such for their benefit and that of their descendants, in perpetuity, precisely as provided in said Laws, and also in the Act of Congress of March 18, 1866, relative to the pueblo lands of San Francisco, (Brief, p. 48.).

(5)

That, the ACT OF APRIL 2, 1866, OF THE LEGISLATURE OF CALIFORNIA, ratifying said "sale" of said therein described "PUBLIC LANDS", by said TRUSTEES (Record, p. 85-6), WAS, THEREFORE, IN CONTRAVENTION OF SAID "LAWS OF THE INDIES",—AFTER 1848, "DOMESTIC LAWS" OF THE UNITED STATES; OF SECTION 10 OF ARTICLE 1, AND ARTICLE 6, OF THE U. S. CONSTITUTION; OF SECTION 2 OF THE PROTOCOL AND SECTIONS VIII AND IX OF THE TREATY OF GUADALUPE-HIDALGO; OF SECTION 12 OF THE CONSTITUTION OF 1849 OF THE STATE OF CALIFORNIA; OF THE ACT OF CONGRESS OF DATE SEPTEMBER 9, 1850, SECTION 3 ADMITTING CALIFORNIA INTO THE FEDERAL UNION; OF THE ACT OF MARCH 3, 1851, GRANTING SOLE JURISDICTION TO THE U. S. FEDERAL GOVERNMENT OVER MEXICAN LAND GRANT

AIMS UP TO AND INCLUDING THE ISSUANCE OF TENTS THEREFOR, BY IT: AND THEREFORE SAID T OF APRIL 2, 1866, OF SAID LEGISLATURE OF CAL-ORNIA COMES WITHIN THE PROVISIONS OF SEC-ON 709 OF THE REVISED STATUTES OF THE UNI-D STATES, AS DULY SET FORTH IN SAID PETITION R SAID WRIT. (Record, p. 94.)

(6)

That, all of said points above presented, together with others set forth in the Record and in the Brief of Plaintiff in Error, Motion to dismiss and affirm, CONSTITUTE, IN LAW AND FACT, THE "FEDERAL QUESTION" AS " CLAIMED", RAWN IN QUESTION" AND "SPECIALLY SET UP" THE BILL OF EXCEPTIONS OF SAID PLAINTIFF ERROR TO THE SAID SUPREME COURT OF CALI-ORNIA,—THE ISSUE PRESENTED THEREIN AND HEREBY BEING WHOLLY FEDERAL IN CHARAC-ER,—TO-WIT:—

"The Petition of the City of Monterey to the Board of Commissioners to ascertain and settle private land claims in the State of California; The proceedings of the Territorial Deputation setting apart the Pueblo Lands to the City of Monterey; The Opinion of the said Board of Commissioners; The Decree of Confirmation by said Board of Commissioners; The Notice of Appeal by the United States to the District Court of the Southern District of California from said Decree of Confirmation; The abandonment of said Appeal, with leave by the Court to proceed under said Decree as upon a final decree; The Patent of the United States to the City of Monterey, bearing date the 19th day of November, 1891."—(Record, pp. 20-34: See, also, Bill of Particulars, 11, Motion for new trial, p. 55). PON WHICH, ALSO, AS EVIDENCE, PLAINTIFF'S HOLE CASE RESTED; SHOWING "AN AUTHORITY XERCISED UNDER THE UNITED STATES", AND HEREFORE NEGATIVING AN AUTHORITY IN SAID

CITY TRUSTEES TO SELL SAID LANDS AS AFORESAID, AND IN SAID LEGISLATURE TO ENACT SAID LAW OF APRIL 2, 1866, RATIFYING SAID SALE, AND THAT OF MARCH 2, 1857, AUTHORIZING SAID "SALE"; WHICH WERE NECESSARILY PASSED UPON IN AN ACTION TO QUIET TITLE, BY SAID "FINAL JUDGMENT" OF SAID SUPREME COURT OF SAID STATE, AND MORE ESPECIALLY SO SHOWN IN THE PARAGRAPHS THEREOF QUOTED IN SAID BRIEF, ON PAGES 2, 3, 4, 15, 60, 61; AND THAT SAID FEDERAL QUESTION WAS RAISED, PRESENTED AND SET UP IN THE ONLY MANNER POSSIBLE, ALLOWED UNDER THE CODE OF CIVIL PROCEDURE OF SAID STATE IN SUCH ACTIONS, (Green-vs-Palmer, 15 Calif. 414-417.)

HAMILTON GAY HOWARD,
Counsel for Plaintiff in Error.

FILE COPY.

In the Supreme Court

of the

United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
FEB 16 1906
JAMES H. McKENNEY,
Clerk.

No. 27

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

NOTICE OF MOTION, MOTION AND ARGUMENT ON MOTION TO DISMISS AND AFFIRM.

JOHN GARBER,
Counsel for Defendant in Error.

FREDERIC D. McKENNEY,
Of Counsel.

Filed this.....day of February, 1906.

....., *Clerk,*

By ..... *Deputy Clerk.*

HIESTER, *Printer*, 559 California St.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,
vs.
DAVID JACKS,
Defendant in Error.

NOTICE OF MOTION TO DISMISS OR TO AFFIRM.

To the City of Monterey, Plaintiff in Error, and to Hamilton Gay Howard, Esq., its counsel:

Please take notice that on Monday, the 12th day of March, A. D. 1906, at the opening of court on said day, or as soon thereafter as counsel and said cause can be heard, the motions of which the annexed are copies will be submitted to the Supreme Court of the United States, at its court room, in the Capitol Building, in the City of Washington, District of Columbia, for the decision of the said Court thereon. Annexed hereto is a copy of the brief of the

argument to be submitted with the said motions in support thereof.

Dated: February 7th, 1906.

Yours, etc.,

JOHN GARBER,
Counsel for Defendant in Error
for the purposes of said motions.

FREDERIC D. MCKENNEY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

MOTION TO DISMISS OR TO AFFIRM.

Now comes DAVID JACKS, the Defendant in error, by his counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the two causes entitled as above, for want of jurisdiction, for the reason that the judgments or decrees to review which said writ has been taken are the judgments or decrees of the Supreme Court of one of the United States, to wit: of the Supreme Court of the State of California, and that there was not drawn in question in said causes, or in either of them, in the said Supreme Court, or elsewhere, the validity of any treaty or statute of, or of any authority exercised under, the United States; or the validity of any statute of, or of

any authority exercised under, the said State of California, or any other of the United States, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and also that no title, or right, or privilege, or immunity, under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, was in said Supreme Court, or elsewhere, specially, or otherwise, or at all, set up or claimed by the said plaintiff in error;

And the said Defendant in error, by his counsel as aforesaid, moves this Court to dismiss the said writ of error upon the ground of irregularities in the said writ, in this: That the said writ has, contrary to law, been taken to review the two said judgments or decrees of the Supreme Court of the said State of California, each of which said judgments or decrees was rendered in a separate cause or suit, and also that it cannot be determined, to which, if to either, or to any, of said actions, the said writ applies;

And the said Defendant in error, by his counsel as aforesaid, also moves the Court to affirm the said judgments or decrees to review which the said writ of error has been taken, because, even if the records in said causes, or in either of them, should be deemed to show that this Court has jurisdiction in the premises, yet it is manifest that the questions upon which such jurisdiction is alleged to depend are so frivolous

as not to require further or extended argument upon the merits.

All of which said matters will fully appear from the following brief or argument of said Defendant in error annexed hereto.

JOHN GARBER,
Counsel for the Defendant in Error
for the Purposes of these Motions.

FREDERIC D. MCKENNEY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

BRIEF OF THE ARGUMENT ON BEHALF OF DEFENDANT IN ERROR ON MOTION TO DISMISS OR TO AFFIRM.

This is a motion by the Defendant in error, David Jacks, to dismiss the writ of error by which the two causes entitled as above have been brought to this Court from the Supreme Court of the State of California, on the ground, briefly, that no federal question of any kind reviewable in this Court arose or was presented in the course of the proceedings in the State courts, and that no right, title, privilege or immunity under the Constitution or laws of the United States, was at any time, or in any manner, set up or claimed therein by the plaintiff in error. The motion to dismiss is based also on the further ground that, by a single writ, it has been attempted to bring up two separate causes for review. Coupled with said motion is a motion to affirm the judgments or decrees of

the Supreme Court of the State of California on the ground that even if this Court should deem that it has jurisdiction herein, it manifestly appears that the questions upon which said jurisdiction depends are so frivolous as not to require or call for any argument upon the merits.

A brief recapitulation of the proceedings in the State courts and a statement of the issues presented in said actions, are necessary to a complete understanding of these motions.

These actions were commenced by The *City* of Monterey, now plaintiff in error, in the Superior Court of the said State of California, in and for the *County* of Monterey, on December 19, 1891, and on November 17, 1896, respectively, to quiet its title to, and to recover the possession of, certain lands situate in said County, and to recover damages for the withholding thereof. The parties to both actions are the same, dismissals having been filed in the Superior Court as to all defendants, except defendant Jacks, and the issues and questions arising therein are identically the same, the actions differing only in respect to the premises respectively affected thereby. As said actions were tried, considered and submitted together in the Superior Court and in the Supreme Court of the State, we shall hereafter consider them together.

The suit was commenced by the filing of a complaint which, as is usual and customary under the laws of said State, averred only the ultimate facts of

the ownership of said lands by the plaintiff, an adverse claim thereto by the defendant, and a statement that the defendant had no estate or interest therein. The defendant, Jacks, answered generally, denying the averments of the complaint and the capacity of the plaintiff to maintain the action, and further set up in bar the plea of the Statute of Limitations. He also alleged title and right of possession in himself, but without praying for affirmative relief.

Upon the issues thus raised by the complaint and answer, the cause came on for trial, and the court thereafter found, generally, that The City of Monterey was not, at or prior to the commencement of the action, the owner or entitled to the possession of any part of the lands sued for, but that on the contrary the defendant Jacks was, at all said times, the owner and in possession thereof. As a conclusion of law, it found that the plaintiff was not entitled to any relief, and a decree in accordance with these findings was thereupon, on September 27, 1899, rendered in favor of the defendant in error. It may be stated, though not here material, that as to the other issues, namely, the plaintiff's capacity to sue and the Statute of Limitations, the findings were in favor of the plaintiff. From this decree, The City of Monterey appealed to the Supreme Court of this State, and said decree was by that Court, on July 11, 1903, affirmed. (*City of Monterey vs. Jacks,* 139 Cal. 542.)

The evidence introduced at the trial, and upon

which the said findings were based, established, in effect, these facts, the following statement of which is largely taken from the opinion of the Supreme Court of the State:

Monterey at the date of the cession of California to the United States was a Mexican pueblo, and, by special concession from the Spanish crown, was entitled to more than the four square leagues of land which, by the laws of Spain, were customarily allotted to pueblos. The city of Monterey was incorporated by an act of the legislature of the State of California, of date March 30, 1850, (Stats. of Cal. 1850, p. 131,) and thereunder succeeded to all the legal rights and claims of the former pueblo to its pueblo lands.

On March 2, 1853, said city, by its attorney, D. R. Ashley, duly retained for that purpose by the city, presented to the United States board of land commissioners appointed in pursuance of the act of Congress of March 3, 1851, (9 Stats. at L. 631,) its petition praying for a confirmation of the pueblo grant to the pueblo of Monterey, and a decree was made accordingly on January 22, 1856, confirming its title. An appeal was taken from this decree by the United States, which decree was on June 16, 1858, dismissed, with leave to the city to proceed upon the commissioners' decree as upon a final decree of confirmation. The patent of the United States to the City of Monterey was issued November 19, 1891, and includes the land in controversy.

In 1857, the original act incorporating the city of Monterey was amended, and by section 7 thereof it was provided as follows: "The trustees may also pay for the expenses of prosecuting the title of the city before the United States Land Commissioners and before the United States courts, and for that purpose may sell and transfer any property, right, or franchise, upon such terms and for such price as may by them be deemed reasonable." (Stats. of Cal. 1857, p. 55.)

On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and, there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the pueblo lands of the city, or so much of them as might be necessary to pay said claim, be made at public auction on February 9, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire pueblo tract was bid in by the said Ashley and the defendant in error, David Jacks, for the sum of $1002.50, being the amount of the indebtedness and of the necessary expenses of sale; no one offering to purchase less than the whole, or to bid a higher amount. Thereafter said trustees made, executed and delivered a conveyance of said lands,

dated February 9, 1859, but acknowledged February 12, 1859, in favor of said Ashley and Jacks, and in the conveyance the proceedings taken by the trustees in the matter of the sale were recited. This conveyance was recorded in the office of the County Recorder of said County of Monterey on June 11, 1859.

While the matter is not, and cannot be, involved upon the present motions to dismiss or to affirm, and while upon any argument upon the merits, the court, we think, would decline to give any consideration to certain innuendoes and insinuations contained in the petition of the City of Monterey for the writ of error, to the effect that fraud was practiced by Ashley and by Jacks in procuring the execution to themselves by the trustees of Monterey of a deed to what is now claimed to have been the whole of its pueblo lands, yet the following statement of facts in relation thereto appears not to be improper.

As already stated, the four square leagues of land to which each pueblo was entitled under the Spanish and Mexican laws, was, in the case of the City of Monterey, increased by special concession from the Spanish crown, the grant to it, which was confirmed by the Mexican Department Legislature on July 24, 1830, aggregating about 60,000 acres. Prior to the conquest of California by the United States, there had been granted from these lands of the pueblo by the Territorial government of California various ranchos to numerous applicants, which ranchos ap-

pear to have together comprised about 25,000 acres, and which, it may well be surmised, were from those portions of the pueblo lands most valuable for agricultural and similar purposes. In addition to these ranchos, a large number of grants were made by the alcaldes or chief magistrates of the pueblo for residence and business lots, the record showing that one alcalde alone thus granted about 2,000 acres, and these grants, we also may infer, were from the pueblo lands most valuable therefor. The residue only of these 60,000 acres was the land acquired by said Ashley and by Jacks, the defendant in error, and of this residue portions were from three to ten miles from the actual town-site of Monterey and some portions were even fifteen miles distant therefrom. As bearing also upon the *value* of the lands acquired by them, it is significant that while grants of large tracts of land extending for hundreds of miles up and down the State were constantly sought for and were seldom refused by the Territorial authorities, yet no such disposition seems to have been made of these lands which must have remained vacant and unoccupied, notwithstanding that they were within the limits of the pueblo of Monterey, then a chief seaport and the head of the civil and military government of Upper California.

The truth is that the City of Monterey did not, by the deed of controversy, convey the whole of its pueblo lands, but merely the remnant thereof which

was of so little value that we do not know that any one ever made public his willingness to receive them from the Spanish or Mexican authorities as a gift.

Indeed, the *amount* of land conveyed to Ashley and to Jacks is a false quantity in this case. Even good land in the early California days was not only plentiful but cheap, and in San Francisco it is a matter of common knowledge that for sums far less than that paid by these gentlemen, numerous sales of undoubted validity were made by its magistrates of lots which at this day are worth hundreds of thousands and, in some cases, even millions of dollars.

Nor may it be said that Ashley, after having procured the confirmation before the tribunals of the United States of the city's title to its pueblo lands, thereupon received, together with Jacks, the whole thereof, upon their bidding an amount just sufficient to cover the fee for his professional services and the expenses of making the sale. The grants of the ranchos already noted were required by the Act of Congress of March 3, 1851, to be directly presented for confirmation, but as to the whole of the residue of the pueblo lands, including all building and residence lots theretofore granted by the alcaldes, the claim was required by the 14th section of the act to be presented by the City, and the confirmation of the City's title at the same time quieted that of all the holders of these lots which, it must be remembered,

were comprised in the 29,698.53 acres of land subsequently patented to the City.

Something may be said as to the *manner* in which the sale now complained of was made. Notice of the time and place thereof was given by posting notices, both in English and in Spanish, in three public places in the City for two weeks prior thereto, and by publication by two insertions in English in a newspaper published at Santa Cruz. The proposed sale, therefore, could not but have been a matter of general notoriety in what was then, and still continues to be, a small town, but despite what is now claimed to have been then and to now be the fabulous value of the lands in controversy, there do not appear to have been present any rival bidders offering to pay more than the amount actually owing, or any one willing to accept a smaller quantity of land in payment of the sum due, as the terms of the sale expressly permitted.

No issue whatever of fraud or of unfair practice has been raised by the pleadings, but because of the charges broadly hinted at by counsel, it is only just to the defendant in error that the preceding statement should be made. After forty years have elapsed since the sale, the City of Monterey should not, after so long a silence, endeavor to impeach and to nullify, by the claim of injustice or by innuendo, its own acts as well as the acts of the legislature by which it was created.

On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows:

> "Sec. 2. All sales and conveyances made by "the corporate authorities of said city since the "eighth day of February, 1859, and which con- "veyances purport to have been recorded in the "county recorder's office of Monterey county, "purporting to convey public lands, or lands "confirmed to said City of Monterey, in pur- "suance of the act of Congress of March 3, 1851, "(9 U. S. Stats. 631,) and entitled An Act to "ascertain and settle the private land claims in "the State of California, are hereby ratified and "confirmed."

On September 4, 1869, said D. R. Ashley conveyed to the defendant in error all his interest in the land in controversy.

While we do not understand that the briefs or arguments of counsel in the Supreme Court are properly a part of the record certified to this Court, or that it is incumbent on the defendant in error to himself negative the suggestion or possibility that a Federal question may have been presented therein, yet in justice to the Supreme Court of the State it may be said, that on the appeal, the City, by its counsel, contended only that the City of Monterey had no power to convey the whole of its pueblo lands, and that the deed of its trustees to said Ashley and Jacks purporting so to do was void upon its face; that, on

principles controlling the exercise of legislative power generally, and without any reference being made to the Constitution, treaties or laws of the United States, the legislature could not validate such a void deed nor dispose of the municipal property without the consent of the city, and, lastly, that the legislative control over lands held in public trust did not extend to a diversion thereof from the uses and purposes for which they were given or acquired. These contentions were each and all decided against the plaintiff, the Supreme Court in its opinion saying:

> "The question in the case is not what power "the pueblo or city of itself had over the pueblo "lands, but what power or control the legislature "had over them, and what authority it could "confer upon the city with reference to their "disposition, and to what extent it could ratify "an attempted but unauthorized sale thereof."

After an extended review of its decisions, the Court concluded:

> "We are satisfied from the above authorities "that while under the Mexican law the officers "of a pueblo were empowered to make grants "of the pueblo lands, yet the pueblos had no in- "defeasible proprietary interest in them; that "they were held in trust for public and munici- "pal purposes, subject to the control and dis-

" position of the Mexican government; that upon
" the establishment of our State government it
" succeeded to the same sovereignty over them
" as was exercised by the former government,
" and that their control and disposition came
" fully, entirely, and absolutely within the power
" of the legislature as representing such sover-
" eignty.

" And as the full and complete control of said
" lands was a matter within the power of the
" legislature, it could have originally conferred
" upon the trustees of the city of Monterey (if
" under the act it did not) the right to dispose
" of them. We think also that there is no doubt
" that the legislature had the power to confirm
" the deed in question, and that the act in ques-
" tion here operated to effect that purpose."

The Supreme Court of the State held further, that the act of the legislature of California of April 2, 1866, purporting to ratify certain conveyances theretofore made by the City of Monterey was sufficient to, and did, validate the deed of its trustees to said Ashley and to Jacks, the defendant in error, and that no constitutional objection to, or limitation upon, the power of the legislature in this respect had been pointed out.

A petition for a rehearing was filed by the City, but was denied without opinion.

At no time in the course of the proceedings in the courts of the State, either in the pleadings, or by motion, exception, instruction, or other action appearing as part or made a part of the record, were there "drawn in question" the validity of any statute or treaty of, or of any authority exercised under, the United States, or the validity of any statute of, or of any authority exercised, under the State of California, or any other of the United States, on the ground of their repugnancy to the Constitution, treaties or laws of the United States, nor was there specially or at all set up or claimed by the plaintiff in error any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States. In fine, no federal question of any kind was ever at any time or in any manner raised or invoked in those courts. We cannot do more than to affirm the fact, and if counsel for the plaintiff in error should in his reply assert that we are mistaken in this regard, we ask that he specifically point out when and where such questions were presented below. An examination of the record, however, will readily establish the correctness of this statement.

The City of Monterey in its petition for the writ of error assigns the following particulars wherein it appears to be claimed that federal questions arise in this case, namely:

1.—The validity of the treaty of Guadalupe Hidal-

go and of the act of March 3, 1851 (9 Stats. 631);

2.—The validity of the act of the legislature of th State of California approved April 2, 1866, confirm ing certain sales theretofore made by the City o Monterey;

3.—The title to the pueblo lands of said City, th fee to which is alleged not to have vested in it unt November 19, 1891, the date of the issuance of th patent of the United States, this assignment bein made under the third clause of section 709 of th Revised Statutes.

Having made this preliminary statement of the i sues involved in these actions, we are now able t proceed to the argument of the motions.

I.

THE WRIT OF ERROR SHOULD BE DISMISSE FOR WANT OF JURISDICTION.

At the outset, we wish to insist that the court without jurisdiction to consider the assignments o error made by the plaintiff in error, because not sea sonably made in the courts of the State. As alread stated by us, no federal question of any kind wa there raised, and the rule is so well settled as scarcel to require any citation of authority in this court tha the assignment of a federal question comes too lat unless the question has been presented for decisio in the State courts, or unless a right, title, immunit

or privilege claimed under the Constitution or laws of the United States has been specially set up or claimed in the State courts. We cite, however, a few of the later authorities on this point.

In *Caro vs. Davidson*, 197 U. S. 197, it is said:

> "Whether the Supreme Court of Florida, if "it sustained the decree of the Circuit Court in "denying the petition on either of the grounds "set up in defense, committed error conizable "here, or whether the act referred to was ap- "plied as asserted in contravention of the Con- "stitution of the United States, we are not called "upon to consider, since we do not find that any "federal question was so raised in the petition "or in the subsequent proceedings thereunder, "at the proper time and in the proper manner, "so as to give jurisdiction under Section 709 of "the Revised Statutes."

In *Bolln vs. Nebraska*, 176 U. S. 83, the Court also says:

> "We have repeatedly decided that an appeal "to the jurisdiction of this Court must not be a "mere after-thought, and that if any right, priv- "ilege or immunity is asserted under the Con- "stitution or laws of the United States it must "be specially set up and claimed before the final "adjudication of the case in the Court from "which the appeal is sought to be maintained."

See, also,

Levy vs. Superior Court, 167 U. S. 175;
Cockran Oil & D. Co. vs. Arnaudet, 26 Sup. Ct. Rep. 41, decided Nov. 13, 1905.
Scudder vs. Comptroller, 175 U. S. 32, 36.

Equally well settled is it, that the petition for the writ of error and the assignments of error, although setting up federal questions, do not form any part of the record upon which this court takes action, and that any assignments of federal questions made therein for the first time come too late to give this court jurisdiction. Indeed it is held, when a federal question is first raised in a petition to the State court for a rehearing of the cause, even though it be fully and adequately presented, if the State court declines to pass upon it because not seasonably made in accordance with its rules and practice, that this court has no jurisdiction to consider the question thus sought to be raised.

Neither is it sufficient that the record in the State court or the rights of the parties reflected thereby would have admitted of the presentation of a federal question which, from the ultimate decision of the State court, must have been decided adversely to the party claiming under it. If in fact such question was not presented or raised and not, therefore, drawn to the attention of the State court, it was not "drawn in question" within the contemplation of the Act of Congress and cannot, therefore, be made the basis of

an application for a writ of error. The federal question must be unmistakably and specifically "drawn in question".

> "The jurisdiction of this Court to re-examine "the final judgment of a State court cannot arise "from mere inference, but only from averments "so distinct and positive as to place it beyond "question that the party bringing a case here "from such court intended to assert a federal "right."
>
> *Oxley Stave Co. vs. Butler County,* 17 Supreme Crt. Rep. 709-711.

Citing and reviewing:

Maxwell vs. Newbold, 18 How. 511, 516;
Crowell vs. Randall, 10 Pet. 368;
Hoyt vs. Sheldon, 1 Black, 518, 521;
Sayward vs. Denny, 158 U. S. 180, 3, 4, 6.

And even in those instances in which a federal question is "drawn in question" and it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a federal question, the judgment of the State court will be affirmed.

Murdock vs. Memphis, 20 Wall. 590;
Adams County vs. B. & M. R. R., 112 U. S. 123;
De Saussure vs. Gaillard, 127 U. S. 216;
Hopkins vs. McLure, 133 U. S. 380;
Hammond vs. Johnston, 142 U. S. 73.

And where a defense is distinctly made, resting on local statutes, this Court will not, in order to reach a federal question, resort to critical conjecture as to the action of the State court in the disposition of such defense.

Johnson vs. Risk, 137 U. S. 300, 307.
Cockran Oil & D. Co. vs. Arnaudet, supra;
Leeper vs. Texas, 139 U. S. 462.

We now proceed to a detailed discussion of the assignments made in this case:

The first assignment evidently refers to the first clause of Section 709 of the Revised Statutes, but the record does not show that there was "drawn in question" in the State courts the validity either of the treaty of Guadalupe Hidalgo or of the act of Congress of March 3, 1851 (9 Stats. 631), providing for the ascertainment and settlement of private land claims in California, nor does it show that the validity of said act or treaty could possibly have been involved in the action or that a decision thereon could have been necessary to its determination. This, of itself, as already pointed out, deprives the court of jurisdiction to consider this assignment.

However, it is apparent that the *validity* of the treaty and of the act could scarcely have been contested by either party to the action, as they formed the basis of the rights of each. As it is well known, by that treaty the territory of which California now forms a part was ceded to the United States, and the

act of Congress was intended to carry out the obligation imposed by the treaty upon the federal government to protect the rights of private land claimants under the Mexican or Spanish laws. That no federal question was here involved is absolutely foreclosed by the repeated decisions of this court, some of them in reference to this same act and treaty.

In *Blackburn vs. Portland Mining Co.*, 175 U. S. 571-579, the Court said:

> "This court has frequently been vainly asked "to hold that controversies in respect to lands, "one of the parties to which had derived his "title directly under an act of Congress, for that "reason alone presented a Federal question. "Thus, in *Romie vs. Casanova*, 91 U. S. 379, "which was an action brought to recover the "possession of certain lands in the City of San "Jose, the question to be determined was, which "of two parties had actually obtained a grant "of the particular premises in question. The "title of City had originated before the cession "of California to the United States, but this "Court said: 'The title of the city was not "'questioned. Even if it depended on the treaty "'of Guadalupe Hidalgo and the several acts of "'Congress to ascertain and settle private land "'claims in California, the case would not be "'different. Both parties admit that title and "'their litigation extends only to the determina-

"'tion of the rights which they have severally "acquired under it.' Accordingly the writ of "error to the Supreme Court of California was "dismissed for want of jurisdiction."

In *Kennard vs. Nebraska*, 186 U. S. 304, the Court said:

"It has often been held that the validity of a "statute or treaty of the United States is not "'drawn in question' within the meaning of sec- "tion 709, every time rights claimed under a "statute or treaty are controverted, nor is the "validity of an authority every time an act done "by such authority is disputed."

Citing,

Baltimore etc. R. R. Co. vs. Hopkins, 130 U. S. 210;

Cook County vs. Canal Company, 138 U. S. 635;

Blackburn vs. Portland Mining Co., 175 U. S. 571;

Florida Central R. R. Co. vs. Bell, 176 U. S. 321-328;

Water Power Co. vs. Street Ry. Co., 172 U. S. 488.

See also, to the same point,

California Powder Works vs. Davis, 151 U. S. 389;

California vs. Jackson, 112 U. S. 237;

DeLamar's Nevada Gold Mining Co. vs. Nesbitt, 177 U. S. 523.

The second assignment of error goes to the alleged repugnancy to the Constitution, treaties and laws of the United States, of the Act of the Legislature of California of April 2, 1866, ratifying the sale by the trustees of the City of its pueblo lands to Ashley and to Jacks, the defendant in error. Here again it is to be noted, that in the State courts, the validity of this Act was not "drawn in question" on any such ground. True it is, that the power of the Legislature to enact it was denied, but, as said by the Supreme Court of the State in its opinion, "while the appellant has challenged the constitutionality of this confirmatory act, it is nowhere pointed out what particular provision of the Constitution has been violated", and still less was any reference made to the Constitution, or to any treaty or law, of the United States. It is well settled that a general reference to the Federal Constitution is not sufficient (*Cockran Oil & D. Co. vs. Arnaudet, supra*), but the provisions specially relied upon must be specifically pointed out. Not even in the assignments of error has this been attempted to be done.

The decision of the Supreme Court of the State was based upon a consideration of the relations existing between the State and the pueblo as a governmental subdivision thereof, and of the extent of the legislative control over the pueblo lands held, as they were, not in private ownership, but subject to certain public trusts. This, it need hardly be said, does not

present any Federal question. Indeed, it is apparent from the Court's opinion that it decided the case quite without thought that any federal question was, or could be, involved in its determination. The case at bar is on this point completely covered by that of

Scudder vs. Comptroller of New York, 175 U. S. 32, 36,

where it is said:

> " No mention of the Constitution of the United " States, or of any provision thereof, by the " plaintiff in error, or by the court, is to be found " at any stage of the case while it was pending in " the courts of the State of New York; and it " is impossible, upon this record to avoid the con- " clusion that it never occurred to the plaintiff in " error to raise a federal question until after the " case had been decided against him in the high- " est court of the State.
>
> " In order to give this court jurisdiction of a " writ of error to review a judgment which the " highest court of a State has rendered in favor " of the validity of a statute of or an authority " exercised under a State, the validity of the " statute or authority must have been 'drawn in " 'question' on the ground of their being repug- " nant to the Constitution, laws or treaties of " the United States. When no such ground has " been presented to or considered by the courts " of the State, it cannot be said that those courts

"have disregarded the Constitution of the "United States and this court has no jurisdic- "tion."

Citing,

United States Revised Statutes, 709;
Murdock vs. Memphis, 20 Wall. 590, 633, 634
Levy vs. Superior Court, 167 U. S. 175;
Miller vs. Cornwall Railroad, 168 U. S. 131;
Columbia Water Power Co. vs. Columbia Railway, 172 U. S. 475, 488.

The third assignment of error is apparently based upon the theory, that as the patent of the United States to the City of Monterey did not issue until November 13, 1891, the title of the City to the lands therein described was wholly unaffected by any disposition or attempted disposition thereof theretofore made by it.

Here again, however, there is encountered the objection already made generally in regard to all of the assignments, and one which applies with particular force to this assignment coming, as it evidently does, under the third clause of Section 709, that no right or title claimed by the City thus to have been acquired by it was ever *"specially set up or claimed"* in the courts of the State of California. This objection is fatal to the jurisdiction of this court, as fully appears from the cases already cited as well

as from the following authorities which more specifically relate to this part of the section.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291;

Telluride Power etc. Co. vs. Rio Grande etc. Co., 175 U. S. 639;

Sayward vs. Denny, 158 U. S. 180;

Morrison vs. Watson, 154 U. S. 111;

Miller vs. Texas, 153 U. S. 535;

Oxley Stave Co. vs. Butler Co., 166 U. S. 648;

Chicago etc. Railway Co. vs. Chicago, 164 U. S. 454;

Poewll vs. Brunswick Co., 150 U. S. 433;

Roby vs. Colehour, 146 U. S. 153;

Spies vs. Illinois, 123 U. S. 131;

Columbia Water Power Co. vs. Columbia etc. Co., 172 U. S. 475;

Home for Insurables vs. New York, 187 U. S. 155.

But in another aspect of the case, this court is without jurisdiction to consider this assignment of error. The conflicting rights of persons each admittedly claiming under a patent of the United States, do not, as already shown, present a federal question.

Blackburn vs. Portland Mining Co., supra; Kennard vs. Nebraska, supra.

However, apart from these considerations, it is clear that this assignment fails to raise a federal

question. The trustees' deed to Ashley and Jacks "granted, bargained and sold" the interest of the City "including and comprising all the right, title and interest which said City has or may have, whether in possession or in expectancy", in and to said lands, and, not only by reason of these express words, but also upon familiar principles of law recognized and enforced in this State (Civil Code, Sec. 1106), passed to the grantees the benefit of whatever title was thereafter acquired by the City.

Equally mistaken in this regard is counsel for plaintiff in error as to the *effect* of the patent, as to which there can no longer be any room for controversy in this court.

In *United States vs. Conway*, 175 U. S. 70, it is said:

> "But the United States in dealing with the "parties claiming under Mexican grants lands "within the territory ceded by the treaty of "Mexico, never made pretense that it was the "owner of them. When, therefore, guided by "the action of the tribunals established to pass "upon the validity of the alleged grants, the "government issued a patent, it was in the na- "ture of a quit-claim—an admission that the "rightful ownership never had been in the "United States, but had passed at the time of "the cession to the claimant, or to those under "whom he claimed. This principle has been

"more than once clearly enounced by this
"court."

In *Langdeau vs. Hanes,* 21 Wall. 521, the Court says:

"In the legislation of Congress a patent has a
"double operation. It is a conveyance by the
"government, when the government has any in-
"terest to convey; but where it is issued upon
"the confirmation of a claim of a previously ex-
"isting title it is documentary evidence, having
"the dignity of a record, of the existence of that
"title, or of such equities respecting the claim as
"justify its existence and confirmation. The in-
"strument is not the less efficacious as evidence
"of previously existing rights because it also
"embodies words of release or transfer from the
"government."

In *Beard vs. Federy,* 3 Wall. 478, 491, it is said:

"In the first place, the patent is a deed of the
"United States. As a deed, its operation is that
"of a quit-claim, or rather a conveyance of such
"interest as the United States possessed in the
"land, *and it takes effect by relation at the time*
"when proceedings were instituted by the filing
"of the petition before the Board of Land Com-
"missioners."

In the leading case of *Landes vs. Brant,* 10 How. 373, it was held, that when an imperfect Spanish

title was sold on execution in an action against the person seeking its confirmation, the perfect title subsequently granted to the execution debtor by the patent of the United States, enured by virtue of the doctrine of relation to the benefit of the purchaser at the sale. This ruling has been consistently adhered to in this court.

While in a narrow view of the case, this assignment might be deemed sufficiently to present a federal question for determination by this court, yet, in the last analysis, it merely involved the matter of conflicting rights based upon the effect of a conveyance made by a confirmee, and this, it already sufficiently appears, does not, of itself, present such a question.

For all of the foregoing reasons, it is, therefore, submitted that the writ of error should be dismissed.

II.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR IRREGULARITY IN THE PROCEEDINGS.

As we have previously stated, there has been attempted to bring to this court for review, by a single writ of error, two distinct causes heretofore pending in the Supreme Court of California. While these actions presented the same issues and differed only in regard to the lands affected by each, it does not appear from the record that they were at any time

consolidated. Section 709 of the Revised Statut which defines the jurisdiction of this court in th regard, provides only that the final judgment or d cree of a State court "in any suit" may be review upon *"a* writ of error", and we are not familiar wi any rule or practice in this court or in the lower fe eral courts which permits more than one suit to presented for review at any one time by a sing writ of error. While this court, as far as we are a vised, has never been called upon directly to deci this point, probably for the reason that it has seldo arisen, it has nevertheless on at least one occasi strongly expressed its opinion as to its irregularity.

In *Brown vs. Spofford,* 95 U. S. 474, it said:

> "Such proceedings are palpably irregula
> "but inasmuch as they are not made the subj
> "of objection by either party, the court has c
> "cided to exercise jurisdiction and dispose
> "the controversy."

In other jurisdictions this practice does not appe to be permitted.

7 Am. & Eng. Enc. of Prac., 855.

III.

THE MOTION TO AFFIRM SHOULD BE GRANTED, FOR THE REASON THAT THE FEDERAL QUESTIONS SET UP ARE MANIFESTLY FRIVOLOUS AND WITHOUT MERIT.

The authorities in this court are numerous and recent that the bare suggestion of a federal question will not, without more, enable the court to take jurisdiction, unless it further appears that some fair reason exists for setting up the claim, and that, unless there is at least the color of merit in the question upon the assertion of which said jurisdiction is endeavored to be sustained, the writ of error will be dismissed. These cases, we submit, apply *a fortiori* where the court, having decided to entertain jurisdiction, is then called upon to say whether or not the question presented for decision is so frivolous as not to require an extended consideration upon the merits, and they also furnish at the same time an admirable test of the nature of the question which is to be deemed so frivolous that a claim thereof will be insufficient to confer jurisdiction upon this court.

In *New Orleans Waterworks Co. vs. Louisiana*, 185 U. S., pp. 336, 344, it is said:

> "It has long been the holding of this court "that in order to warrant the exercise of juris- "diction over the judgments of State courts, "there must be something more than a mere

"claim that a federal question exists. There
"must, in addition to the simple setting up of
"the claim, be some color therefor, or, in other
"words, the claim must be of such a character
"that its mere mention does not show it destitute of merit; there must be some fair ground
"for asserting its existence, and, in the absence
"thereof, a writ of error will be dismissed, al-
"though the claim of a federal question was
"plainly set up."

In *Sawyer vs. Piper,* 189 U. S. 154, the Court says:

"While they thus asserted the existence of a
"federal question, yet it is well settled that the
"mere averment of such a question is not suffi-
"cient. As was said in *Hamblin vs. Western Land Company,* 147 U. S. 531, 532: 'A real
"'and not a fictitious, federal question is essen-
"'tial to the jurisdiction of this court over the
"'judgments of State courts. (*Millinger vs. Hartupee,* 6 Wall. 258; *New Orleans vs. New*
"'*Orleans Water Works Co.,* 142 U. S. 79, 87.)
"'In the latter case it was said that: "the bea
"averment of a federal question is not in all
"cases sufficient. There must be at least color
"of ground for such averment, otherwise a fed-
"eral question might be set up in almost any
"case, and the jurisdiction of this court invoked
"simply for the purpose of delay."'"

See also, to the same point:

St. Louis etc. Ry. Co. vs. Missouri, 156 U. S. 478, 484;

McCain vs. Des Moines, 174 U. S. 171;

New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79;

Wabash Ry. Co. vs. Flannigan, 192 U. S. 29;

Wilson vs. North Carolina, 169 U. S. 586.

In view of the somewhat extended consideration which has been given to the assignments of error upon the argument of the motion to dismiss for want of jurisdiction, it is believed that there is not now required more than a brief discussion of the questions which they present.

By the first assignment of error it appears to be claimed that the Supreme Court of California has somehow decided against the validity of the Treaty of Guadalupe Hidalgo and of the Act of Congress of March 3, 1851. Even at first blush this contention would seem to be absurd, as it can only be upon the assumption of their validity that the defendant in error has any title at all, since he claims solely as the grantee of the City and the City's title necessarily depends upon such validity. However, as we have already abundantly shown, the mere fact that the City itself thus derives its title, entirely fails to import a federal question into this case.

In regard to the second assignment of error which is based upon the alleged repugnancy of the Act of

the Legislature of California of April 2, 1866, to the Constitution, laws and treaties of the United States, it seems enough to say that not only was no such contention made in the State court, but hat the court rested its decision solely upon a consideration of the relations existing betwen the State and its pueblos. a question of purely local, administrative law, and in nowise presenting a federal question. This *ratio decidendi* is amply broad enough to sustain the decision of the State court.

The third assignment of error is based upon the claim that the title of the City of Monterey to its pueblo lands was acquired only by virtue of the patent of the United States and was not affected by the deed of its trustees to Ashley and Jacks. But not only was this deed, explicitly confirmed, as it was, by the State legislature, sufficient in form and by reason of the express words contained therein, sufficient to carry any title thereafter acquired by the City, but, as we have seen, it is settled in this court beyond any possibility of successful attack that the patent took effect by relation to the time when proceedings for the confirmation of the City's title were instituted before the Board of United States Land Commissioners. This question, moreover, appears to be one relating more particularly to the general law of real property.

We venture, therefore, to say that the frivolousness

of the federal questions attempted to be set up herein has been sufficiently shown.

It is, therefore, submitted that the writ of error should be dismissed for want of jurisdiction as well as also for irregularity in the proceedings, or, if the court should decide to entertain jurisdiction, that the judgments of the Supreme Court of the State of California should at this time be affirmed for the reason that the federal questions upon which that jurisdiction has been sought to be here sustained, are manifestly frivolous and without merit.

Respectfully submitted,

JOHN GARBER,

Counsel for the Defendant in Error for the Purposes of said Motions.

FREDERIC D. MCKENNEY,

Of Counsel.

Supreme Court of the United States.

No. 27.—October Term, 1906.

The City of Monterey, Plaintiff in Error, *vs.* David Jacks. } In error to the Supreme Court of the State of California.

[December 3, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

Action to quiet title brought by plaintiff in error (and, being plaintiff in the court below, we will so designate it) in the Superior Court of the county of Monterey to 1,635.03 acres of land, situate in Monterey County, State of California. Plaintiff alleged title in fee simple, and contends that such title has come to it as successor of the pueblo of Monterey of Upper California. There is no dispute that the land was part of the pueblo of Monterey, and that, after proper proceedings had in pursuance of acts of Congress, the title of the city of Monterey was confirmed by a decree of the Board of Land Commissioners and a patent issued to the city November 19, 1891.

The defendant gets his title through one D. R. Ashley, who was the attorney for the city, to present and prosecute its claim to the land before the Board of Land Commissioners. To pay the indebtedness incurred for his services the land was sold under the authority of certain acts of the legislature of the State, and purchased by him. The validity of the title so derived, as against the title of the city as successor of the pueblo of Monterey, free from the control of the legislature, makes the question in the case. Judgment passed for the defendant in the trial court and was affirmed by the Supreme Court. (139 Cal. 542.) This writ of error was then allowed.

The city of Monterey was incorporated by an act of the legislature of the State of California, March 30, 1850, and became thereby successor of the former pueblo to its pueblo lands. In 1857 the charter of the city was amended, and by section 7 thereof the trustees were empowered to pay off the expenses of prosecuting the title of the city before the United States land commissioners and before the United States courts, and for that purpose sell and transfer any property, right or franchise upon such terms and for such price as might by them be deemed reasonable. It was found by the lower courts (and we quote from the opinion of the Supreme Court) that—

"On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the pueblo lands of the city, or so much of them as might be necessary to pay the claim of said Ashley, be made at public auction on the 9th day of February, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire pueblo tract was bid in by the said D. R. Ashley and the defendant David Jacks, for the sum of $1,002.50, being the amount of the indebtedness and the necessary expenses of sale; no one offering to purchase less than the whole, or bid a higher amount. Thereafter said trustees made, executed and delivered a conveyance of said lands, dated February 9, 1859, but acknowledged February 12, 1859, in favor of said D. R. Ashley and the defendant David Jacks, and in the conveyance the proceedings taken by the trustees in the matter of such sale were recited. This conveyance was recorded in the county recorder's office of the county of Monterey on June 11, 1859. On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows: 'Sec. 2. All sales and conveyances made by the corporate authorities of said city since the 8th day of February, 1859, and which conveyances purport to have been recorded in the county recorder's office of Monterey County, purporting to convey public lands, or lands confirmed to said city of Monterey, in pursuance of the act of Congress of March 3, 1851, and entitled An act to ascertain and settle the private land claims in the State of California, are hereby ratified and confirmed.' On September 4, 1869, Ashley conveyed all his interest in the land in controversy to the defendant."

The contentions of the parties are in part made to turn upon the kind of right the city of Monterey derived as the successor of the pueblo of Monterey, whether proprietary or in trust, and because in trust subject to the disposition of the legislature of the State. This distinction was expressed by the Supreme Court and the case determined by it, and the court supported its action by a citation of prior decisions. It was said: "There is a marked difference, however, between lands which are held by a municipality in trust for public, municipal purposes, such as pueblo lands, and lands acquired by a municipality through purchase or special grant, and held in proprietary right." Of the latter class it was said: "That it is beyond the power of the State to control its disposition without the consent of the municipality." In the other case, "the lands being simply ancillary to the execution of the public trust—lands in which the pueblo never had an indefeasible proprietary interest—and which were subject to the supreme political dominion of the former Mexican government, became equally subject to the sovereignty of the State of California through its legislature upon the change of government."

Plaintiff attacks this conclusion, and contends that the title to the lands vested, not in the State of California as succeeding sovereign, but in the

United States, and the United States, having the title, passed it by the patent of November 19, 1891, to the plaintiff. And this contention, plaintiff asserts, presents the Federal question to be decided. At one time this might have been regarded as a serious question, but it is no longer so. Whatever of legal power the State of California may exercise over its municipalities has received decisive definition in many decisions. The cases are quoted by the Supreme Court in the case at bar. Whatever power the United States may exercise, or, by refraining from exercising, yield to the State of California to exercise, has long been decisively settled. We need not review the cases. An exposition of them can be found in *United States* v. *Santa Fe*, (165 U. S. 675.)

If the United States was, as contended, a paramount sovereign, and as such possessed the power to direct the trust to which pueblo lands were subject, it did not do so, but conveyed land to the "city of Monterey, its successors and assigns." In other words, the conveyance was made to a municipality of the State of California, a creature of the laws of the State and subject to the State. (*Payne* v. *Leadwell*, 16 Cal. 620; *San Francisco* v. *Carraran*, 42 Cal. 541.) See also *Kies* v. *Lowrey*, (199 U. S. 233.) And we may observe that the United States by an act passed June 15, 1906, has designated the city of Monterey as trustee of the original grant and confirmed the land to the city as patented. (34 Stat. 267.)

We do not think, however, that the Federal question presented is so far unsubstantial as to justify a dismissal of the writ of error, and the motion to dismiss is denied.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.